

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

THE UNITED STATES OF AMERICA, : 2:19-CR-00350-JD-1
Plaintiff, : 2:19-CR-00350-JD-2
vs. : 2:19-CR-00350-JD-3
: Philadelphia, PA
DONNIE SMITH, ABID STEVENS :
AND MAURICE QUINN : January 28, 2020
Defendant. : 10:21 a.m.

TRANSCRIPT OF JURY TRIAL - DAY TWO
BEFORE THE HONORABLE JAN E. DUBOIS
UNITED STATES DISTRICT JUDGE

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(Proceedings recorded by electronic sound recording,
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WITNESS: Porfiro Joel Ventura (under separate cover)

E X H I B I T S

PLAINTIFF'S

NUMBER	DESCRIPTION	MARKED	ADMITTED
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N/A

N/A

N/A

N/A

DEFENDANT'S

NUMBER	DESCRIPTION	MARKED	ADMITTED
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N/A

N/A

N/A

N/A

(* Marked prior to the start of the proceeding.)

P R O C E E D I N G S

1 THE COURT: Good morning everybody.

2 MULTIPLE SPEAKERS: Good morning, Your Honor.

3 THE COURT: Please be seated.

4 I call the case of United States of America
5 versus Donnie Smith, Abid Stevens and Maurice Quinn. Criminal
6 number 19-350. We're beginning day two of the trial.

7 I decided it was necessary to talk to counsel
8 out of the presence of the jury, because there was an issue
9 raised yesterday. I directed that briefs be submitted. None
10 were submitted and we're going to have to rule or the
11 government is not be permitted to call the witness until I
12 have enough material to enable them to rule.

13 So I want to know what, if anything, has been
14 done with respect to the issue of the immigration status of
15 one of the government's witnesses.

16 MR. ECKERT: Well, Your Honor, I think that
17 where we are is this, the defense had a good faith basis to
18 ask them about his immigration status, if there's some kind of
19 issue there, and I think the proffer for that needs to be more
20 than just he's a Hispanic person than certainly, they may be
21 able to inquire about that, but again, we have -- I don't
22 believe the government can ask the victims of crimes just
23 because they are Hispanic about their immigration status.
24 We've received no information whatsoever that the victim in
25 this case is not of legal status, but it's an incredibly

1 showing the fact, and it frankly goes against many things that
2 this country stands for, for us to say to him, just because
3 you're Hispanic, we think it might come up, so what's your
4 immigration status.

5 Now, again, if there's some information that
6 they have or if we had discussed any kind of benefits with
7 him, absolutely, we have an obligation, particularly to turn
8 that over, but we have not had any discussion with him
9 whatsoever about his immigration status. Now, again, if they
10 have some good faith basis under cross-examination to ask him
11 about his immigration status then it's more than just he's
12 Hispanic, and I think they would have a right to do that, but
13 that's where the government stands on the issue.

14 THE COURT: Your position is that defense
15 counsel can ask the witness about his immigration status?
16 Supposing he says, I'm an illegal immigrant, then what?

17 MR. ECKERT: Then they could argue whatever --
18 if that's the motive they fabricated in their opinion, I think
19 they would have a right to argue that in closing. We'd have
20 to think more about what the bounds of that argument is, but
21 I -- again, I say that with the caveat that I think there
22 needs to be more than just this guy works in a store, he's
23 Hispanic, therefore we have a right to ask him. If there's a
24 reason that they think he's not of status then sure, I think
25 they get to ask him that as it would go to a motive to

1 fabricate.

2 THE COURT: From the government's perspective,
3 is the defense permitted to ask a second question or a second
4 line of questions? Have you communicated with the government
5 about this? What about that?

6 MR. ECKERT: I mean, I haven't thought of that.
7 I haven't really thought about that, Your Honor. I stand hear
8 saying I've never talked to him -- talked to the victim about
9 his immigration status, and I haven't discussed that with him
10 in the context of, hey, I think this conversation might come
11 up, in fact, I have specifically avoided that for the reasons
12 I've stated. I don't think it's appropriate for me to ask
13 them about some kind of basis that to believe there's an
14 issue.

15 THE COURT: What about the privilege about
16 self-incrimination?

17 MR. ECKERT: So, I mean, if -- I guess if you
18 were to answer yes, there's an issue, then we could certainly
19 get [indiscernible].

20 THE COURT: Well, that doesn't really work. Do
21 I have to appoint counsel for him to advise him? What I'm
22 telling you is that no one in this courtroom, to my knowledge,
23 really thought this out, and to surface the issue as an oral
24 motion in limine, at the beginning of proceedings yesterday, I
25 think that's a mistake.

1 MR. ECKERT: May I just offer one point, Your
2 Honor?

3 THE COURT: Yes.

4 MR. ECKERT: We have no information whatsoever
5 to suggest that this man is not of legal status. If there's
6 something they know that we don't we can certainly discuss
7 that, but I don't -- I don't believe that the government
8 should be instructed to ask all its witnesses just because
9 they're a defendant, are you legally in the United States.

10 THE COURT: Well, I asked you to show me
11 something. There must be some protocol in the office. This
12 has to come up in Philadelphia prosecutions and the solution
13 that you've come up with, allowing defense counsel to ask him,
14 really puts him in the position of possibly incriminating
15 himself without having been warned he has a right under the
16 Fifth Amendment not to do so.

17 MR. ECKERT: So I certainly raised this issue
18 with my supervisor in the discovery court -- they were with me
19 as we take the position that if we are aware that a person
20 lacks legal status that would be [indiscernible] that we would
21 turn over, but again, we have no information to suggest that
22 the victim in this matter --

23 THE COURT: Well, he's a key witness in a case
24 involving three defendants. Was he an eye witness to all or
25 part of the events that you believe occurred on March 22,

1 2019?

2 MR. ECKERT: Yes, Your Honor.

3 THE COURT: Was he?

4 MR. ECKERT: He was.

5 THE COURT: Have you considered or did you
6 consider inquiring and granting him immunity if he ended up
7 telling you that he was an illegal immigrant?

8 MR. ECKERT: If he would've told us that -- if
9 he would've told us that he had an issue, we absolutely
10 would've explored some sort of -- all those possibilities, but
11 he's never raised any concerns to us whatsoever about his
12 status.

13 THE COURT: Well, what the you're suggesting is
14 we don't instruct him and let him raise any of these concerns,
15 some of which might be very damaging in open court.

16 MR. ECKERT: Well, what's the basis? What's the
17 basis? Just because he's Hispanic, we get to ask him these
18 questions? That's what I fail to understand.

19 MR. WITTELS: If I may, Your Honor.

20 THE COURT: All right. Yes.

21 MR. WITTELS: The basis is, my client tells me
22 that the witness told him that he was here illegally.

23 THE COURT: Illegally?

24 MR. WITTELS: Yes.

25 MR. ECKERT: And that would be a good faith

1 basis. I would agree that if that's their basis, then they
2 get to ask him the question, but --

3 THE COURT: Wait a minute. We now have at least
4 some evidence that witness is here illegally.

5 MR. ECKERT: Well --

6 THE COURT: And you want me to permit the
7 defense to ask him on the stand in open court, under oath,
8 whether he's here legally and you want me to allow him to
9 possibly, I don't know how he'll answer that question, but
10 possibly incriminate himself or possibly commit perjury in
11 answering that question, without appointing counsel and
12 without advising him -- without anyone advising him of his
13 privilege against self-incrimination under the Fifth
14 Amendment.

15 MR. ECKERT: Again, I wish I had a better
16 solution, but I don't know what -- if the Court's going to
17 direct us to inquire as to someone's immigration status,
18 because a defendant says in his own interest that, hey, this
19 guy's told me -- it's some evidence, and the standard for
20 cross-examination questions is very low for good reason.

21 THE COURT: You misunderstand. Whether there is
22 a basis for cross-examination is an issue, but we'll never
23 know how he will answer that question for sure, and if he
24 incriminates himself, he can be removed from the country. He
25 can be charged criminally, and that presents problems for me.

1 And I asked for briefs and I got nothing.

2 All right, Mr. Eckert, you may be seated. I
3 gather, I've gotten all I can get from you on his issue. Ms.
4 Meehan.

5 MS. MEEHAN: Thank you, Your Honor, I apologize,
6 but I'm in the process of filing a letter brief. It's my
7 understanding and for with the limited amount of research we
8 did it, it looks like the government doesn't necessarily have
9 to ask a witness if he is -- what his immigration status is,
10 but if they're aware of it, and in fact, he's here illegally
11 that could be Brady material.

12 Your Honor, anecdotally, I know of -- well, let
13 me explain why I think it's relevant in this case. As Your
14 Honor pointed out, Mr. Ventura is the government -- is a key
15 witness for the government. He's a victim of a crime. There
16 may be and I'm not saying that I'm absolutely going to
17 cross-examine him on his immigration status, but if in fact,
18 he deviated from prior statements or he embellishes to the
19 point where what we suggest was a very blown out of proportion
20 argument, and he embellishes that even more than what we have
21 already or deviates or is inconsistent, and this develops into
22 more of the fact that he's a victim, then I will want to
23 cross-examine him, because if he is, in fact, a victim of an
24 I'm that is motive for somebody who is -- whose immigration
25 status here is tenuous. That is motive for them to curry

1 favor with the government. There are two different types of
2 visas he could be eligible for, potentially. One is an S
3 Visa, for cooperation with the government, and I understand
4 that Mr. Eckert is saying we haven't offered that. There's no
5 discussion, I understand that, but I don't know what is in Mr.
6 Ventura's mind and then there is a U Visa for crime victims.
7 And one of the reasons that I think that the City of
8 Philadelphia has the sanctuary policy that they don't ask
9 victims, is because they want the victims to come forward.
10 This government has the opposite. They have a zero-tolerance
11 policy for people who are here illegally, so I understand why
12 they wouldn't want to ask the witness that question, because
13 it poses exactly what Your Honor just suggested, is that this
14 individual would be incriminating himself on the witness
15 stand.

16 THE COURT: But if you asked the question, if I
17 allowed you to ask the question and that appears what the
18 government thinks is appropriate, the witness might very well
19 end up incriminating himself without having any guidance.

20 MS. MEEHAN: I agree with Your Honor. It poses
21 a problem, but at the same time, Mr. Quinn and Mr. Stevens and
22 Mr. Smith have a right to confront and cross-examine the
23 witness as to any relative motive or bias and I think if he
24 does tend to be -- if it's our belief as defense counsel that
25 he's exaggerating or embellishing that that might be fertile

1 ground for demonstrating that he has some motive to do so, and
2 Your Honor, I know, I see my colleague in the back of the
3 room, anecdotally, I know there was a case, the U.S. versus
4 Jawan Shaw in front of The Honorable Judge Baylson in which a
5 similar issue came up where the defense was saying that the
6 witnesses had fabricated some or all of a robbery of a pizza
7 delivery man or a pizza store, I'm not quite clear on the
8 evidence, but that -- Judge Baylson allowed cross-examination
9 of the victim witnesses in that case, and they were in fact
10 here, they had no legal status here is my understanding and I
11 could explore that more at the lunch break.

12 THE COURT: Was there a written opinion?

13 MS. MEEHAN: I don't know the answers to that,
14 Your Honor. I don't --

15 UNIDENTIFIED SPEAKER: No, Judge, there was no
16 written opinion [indiscernible]. Judge Baylson just allowed
17 me to cross-examine one of the witnesses, an eye witness to an
18 alleged robbery [indiscernible].

19 THE COURT: Well, there might have been
20 circumstances in that case that warranted it. Here we have a
21 situation where no one in the courtroom knows for sure how the
22 witness will answer a question, are you here legally or
23 illegally, and I'm concerned with allowing a witness to
24 incriminate himself without proper counsel. Now, the
25 government better come up with a way to resolve that problem

1 or someone better come up with a way to resolve that problem.
2 And the witness is not going to testify until it's resolved,
3 and I know how important it is.

4 MR. ECKERT: I understand the government's
5 ruling.

6 THE COURT: What?

7 MR. ECKERT: I understand the Court's ruling.

8 THE COURT: How do you intend to proceed?

9 MR. ECKERT: I would ask for a moment to contact
10 my supervisor, because I don't -- I frankly, don't know and I
11 don't want to bind the office to this position. I think this
12 is a very significant problem. It's very likely to come up in
13 the future whether a victim of a crime is of the
14 [indiscernible] that would suggest the people --

15 THE COURT: I can't believe it hasn't been
16 addressed.

17 MR. ECKERT: I discussed it with them last night
18 and they directed me -- had a discussion that --

19 THE COURT: Did anyone raise the Fifth Amendment
20 issue?

21 MR. ECKERT: May I have one moment, Your Honor?
22 Not directly. What was told to me was that if we had any
23 knowledge that he was not here legally that would be Giglio
24 [ph] that we would turn over, but we no basis to think that
25 this guy's not here legally. So how would we ask him that?

1 On what -- on what plant would anyone ever come into us and
2 say, yes, I'm a victim of a crime, and if the next question
3 from the government is, are you here legally, and I understand
4 the Court's --

5 THE COURT: Well, then the answer is, you
6 should've thought it through and ask me to appoint counsel to
7 represent him, and then counsel could handle it. That would
8 satisfy me completely.

9 MR. ECKERT: But do we do that with every
10 witness who's Hispanic? What -- we have no basis to think
11 this guy is not here legally.

12 THE COURT: Well, maybe a little basis, in
13 your -- Mr. Wittels' client statement, but I don't think
14 that -- that's not the answer, and I guess when you have a key
15 government witness in a case, and I know how important -- I've
16 read your submission, so I don't know how important this
17 witness is to you, but I'm not going to allow the government
18 to sacrifice a witness. You've got to do something to protect
19 him and you can. You could have thought of this. You had to
20 think of this. I mean, it was the first thing that crossed my
21 mind when the issue was raised yesterday. It didn't occur to
22 me until Ms. Meehan raised the question.

23 I just don't know what your thinking is, but you
24 can certainly determine from your superior how they want to
25 handle it. One way to do it is to -- see, I don't know how

1 long it takes and I'm sure it takes a while to get proper
2 clearance to grant immunity, you can do that. There are lots
3 of ways you could have handled it. I don't know that you can
4 handle it in short notice, and the last thing in the world I
5 want to do is continue the trial, but although the Speedy
6 Trial Act clock has stopped, because we started jury
7 selection, jeopardy, did jeopardy attach when you swore the
8 jury?

9 MR. ECKERT: It did, Your Honor.

10 THE COURT: Then you have a real problem. Talk
11 to your superior and see how they want to handle it, but Mr.
12 Wittels -- why don't we let Mr. Wittels speak first.

13 MR. WITTELS: Yeah, Judge, additionally, I
14 received a communication, I believe other counsel did from the
15 government last night that they have discussed with Mr.
16 Ventura, the witness, and his -- relocating him and his
17 family, although no money has been spent on relocating him. I
18 don't think you can relocate someone who's an unlawful,
19 undocumented alien, because they're subject to deportation.

20 THE COURT: Thank you.

21 MR. ECKERT: Right. Under Giglio, we turned
22 over the fact that we provided him with one night of
23 emergency --

24 THE COURT: I'm sorry, say that again.

25 MR. ECKERT: Under Giglio, we turned over --

1 last night, we put him up in a hotel, because he's scared.
2 And so we turned that over under Giglio that we gave him -- we
3 provided him with a hotel and he's -- we've discussed
4 potential -- the possibility of relocation, but we have not
5 spent any money as of yet. Both of those things can be
6 cross-examined, if the defense wants to. That's why we turned
7 it over.

8 Again, we have no information to suggest he's
9 not here legally. So to Mr. Wittels' point, I'm just lost as
10 to how -- what we're expected to do when he says, oh, I'm
11 scared, so I would like to go to a hotel, why, are you here
12 legally, we -- we're not in the position to do that.

13 THE COURT: Did he say why he was afraid? Why
14 he was "scared" and --

15 MR. ECKERT: He did, and I'm not at liberty to
16 discuss that in open court, Your Honor. They're very specific
17 concerns.

18 THE COURT: Well, I see nothing, absolutely
19 nothing wrong with what you've just said, you put him up in a
20 hotel and told the defense, and also told the defense you're
21 at least potential long-range plans, but that doesn't
22 alleviate the issue of having a witness on the witness stand
23 being asked a question that might incriminate him and might
24 end up either in criminal proceedings or removal.

25 MR. ECKERT: Sure. I ask for 10 minutes to run

1 that issue with my superiors.

2 THE COURT: My suggestion is you do that, and
3 you might want to go all the way. I remember sitting in this
4 chair and looking at government counsel and seeing as the line
5 AUSA, the current U.S. Attorney, he's got a lot of experience
6 in the courtroom, and see what you come up with. How much
7 time do you think you need?

8 MR. ECKERT: Ten to fifteen minutes, Your Honor.

9 THE COURT: Fine. I'm going to ask Michael,
10 Michael.

11 DEPUTY CLERK: Yes.

12 THE COURT: I want you to advise the jury that
13 we have a legal issue and it will take us, oh, another 10 or
14 15 minutes.

15 DEPUTY CLERK: [Indiscernible].

16 THE COURT: What?

17 DEPUTY CLERK: [Indiscernible].

18 THE COURT: I'm sorry, I thought you were --

19 UNIDENTIFIED SPEAKER: I -- it's fine.

20 THE COURT: I thought you were not here. All
21 right. I think what we'll do is recess and Mr. Cosgrove will
22 stay in the courtroom. Let us know what you decide. There
23 might very well be a way to resolve this, but I haven't
24 thought of it, and it certainly hasn't been provided by anyone
25 in the courtroom. So with that, we'll be in recess, 15 or 20

1 minutes, hopefully you can get back to us by then.

2 Is there anything else you have to do first?

3 Nothing? We're in recess for 15 or 20 minutes.

4 DEPUTY CLERK: All rise.

5 - - -

6 (Whereupon, there was a recess in the proceeding from

7 10:41 a.m. to 11:26 a.m.)

8 - - -

9 DEPUTY CLERK: All rise.

10 THE COURT: Be seated, everyone. We have done a
11 little more research, and made some telephone calls, but I
12 want to hear from you first.

13 MR. ECKERT: May I?

14 THE COURT: You may, sir.

15 MR. ECKERT: Your Honor, we -- my supervisor
16 made the call to inquire of the witness what his immigration
17 status was, and we confirmed this through the United States
18 Citizenship and Immigration Services. The witness -- it has
19 been discussed, Mr. Ventura is a conditional permanent
20 resident with a pending application to remove conditions.
21 Thus, he is currently in lawful status to live and work in the
22 United States and not subject to removal. His status is
23 derivative through his wife who is a citizen.

24 THE COURT: Well, that solves the problem. I
25 think.

1 MR. ECKERT: We would agree with that, Your
2 Honor.

3 THE COURT: Does everyone agree it solves the
4 problem?

5 MR. PATTERSON: Yes, Your Honor.

6 MS. MEEHAN: Yes, Your Honor.

7 THE COURT: For the benefit of all of you --

8 MR. WITTELS: Sorry, Judge. Is he currently in
9 removal proceedings?

10 MR. ECKERT: No. He's not subject to removal
11 proceedings.

12 MR. WITTELS: He's not subject. Okay.

13 THE COURT: For the benefit of all of you, I
14 think were the defendant not a legal -- well, I think this,
15 first of all, there are several crimes relating to immigration
16 status. Illegal entry and illegal reentry are of course
17 crimes. Mere presence in the United States unlawfully, I am
18 told, and this would have to be verified, I am told that is
19 not necessarily a crime. It might not be a crime, unless
20 there was an illegal entry or an illegal reentry, but mere
21 unlawful presence in the United States standing alone, not a
22 crime. But what happens if a defendant makes that type of
23 statement or admission on the witness stand, he would be
24 subject to removal by ICE. So there are issues.

25 I quickly called an attorney, a defense attorney

1 known to me, he was a clerk for me, and in my judgment he is
2 just super, and he's very familiar with immigration law and
3 volunteered to come to the courthouse if necessary and meet
4 with the witness and his attorney, undertake representation.
5 And I mention all of this, because I think that's the way the
6 government should consider proceeding with this type of case
7 in the future. Not necessary in this case in view of his
8 status and I guess so much for the education.

9 Now, in view of that answer, you're not going to
10 ask the question?

11 MS. MEEHAN: No, Your Honor.

12 THE COURT: Fine. And no one else, Mr. Wittels?
13 Mr. Patterson?

14 MR. PATTERSON: No, Your Honor.

15 MR. WITTELS: No, Judge.

16 THE COURT: Will not ask the question?

17 MR. WITTELS: No, sir.

18 MR. PATTERSON: No, Your Honor.

19 THE COURT: Then it is indeed a moot issue. And
20 it's only taken an hour and a half, but I'm glad it was
21 resolved. Is there anything else that needs to be done?

22 MR. ECKERT: Not from the perspective of the
23 government, Your Honor.

24 THE COURT: Then where are we in the trial?
25 We're ready to proceed with preliminary jury instructions?

1 MR. ECKERT: We are, Your Honor.

2 MR. PATTERSON: Your Honor, we discussed this
3 previously. It was the intent, subject to the Court's
4 approval for openings only and it would be consistent with how
5 the series of events progressed that Ms. Meehan would go first
6 for openings. And then after openings we would go back to the
7 normal progression of me going first, since Mr. Smith is the
8 first on the indictment.

9 THE COURT: All right. You want me to give my
10 preliminary jury instructions first, though?

11 MR. PATTERSON: Yes, Your Honor.

12 THE COURT: I have two versions. I have the
13 short version and the long version. And I'm inclined to think
14 the short version is the one I'm going to give. It's too --
15 and we've kept the jury waiting too long.

16 So Ms. Hull, and then I want you to call
17 [indiscernible].

18 DEPUTY CLERK: All rise.

19 - - -

20 (The jury enters the courtroom.)

21 - - -

22 THE COURT: Be seated, everyone. A very belated
23 good morning, and an apology for two things. Number one, the
24 breakfast that I promised you, never arrived because by the
25 time we recessed yesterday, it was too late to order anything

1 for you, but we have remedied that and you have our apology.

2 Number two, you also have my apology for the
3 delay in getting started this morning. Late last evening,
4 after you were on your way home, one of the attorneys raised a
5 legal issue that no one involved in the case had ever
6 considered, and it was, in my judgment, harkening back to my
7 law school days, one of these exciting legal issues that we
8 had to get decided before we could proceed.

9 And it's not one that comes up regularly, or at
10 all. We could find absolutely no authority, but we worked
11 through it. Unfortunately, working through it took about an
12 hour and a half this morning and it should not have. My goal
13 in trying this case is to have you in the courtroom when
14 you're in the building and not sitting in the jury room. So
15 we're going to try to avoid any delays such as this one.
16 Again, it was unexpected, and we're going to keep them to a
17 minimum.

18 I'm smiling a little bit, because the legal
19 issue was the kind of stuff that I remembered talking about in
20 law school and for me, that was a heck of a long time ago.
21 Let the record show, there was a chuckle from the jury.

22 I'm now going to give you preliminary jury
23 instructions that will help guide you in your participation in
24 the trial. It will be your duty to find from the evidence in
25 the case what the facts are. You will hear all of the

1 evidence and you decide what is believable or credible.

2 That's your job. You're the fact finders and you decide the
3 case.

4 You're the judges of the facts. You will then
5 have to apply these facts, the facts that you find to be
6 believable to the law as I instruct you on the law, and reach
7 a verdict. And you must follow the law that I give you,
8 whether you agree with it or not.

9 Nothing I may say or do during the course of the
10 trial is intended to indicate, nor should be taken by you, as
11 indicating what your verdict should be. You, and you alone,
12 decide this case.

13 Now, the evidence from which you will find the
14 facts, consist of the testimony of witnesses and they'll
15 testify from the witness stand. On my right, your left,
16 documents and other things received into the record as
17 exhibits. And any facts the lawyers agree to or stipulate to.

18 I should tell you that a stipulation is fancy
19 legal word for an agreement. And in cases where the parties
20 agree that something can be proven by witnesses, rather than
21 call the witness into court and take the Court's time and the
22 jury's time, the parties agree or stipulate to certain facts.

23 Now, certain things are not evidence, and must
24 not be considered by you. And I will tell you what they are.
25 Number one, statements or arguments and questions by lawyers,

1 are not evidence. The evidence in the case is the question
2 asked of a witness and the witnesses answer taken together.
3 And of course, all of the other exhibits and other things that
4 are offered in evidence, in addition to the testimony of the
5 witnesses.

6 Two, objections to questions are not evidence.
7 Lawyers have an obligation to their clients to object to a
8 question when they believe the question is improper under the
9 rules of evidence. The rules of evidence set a floor below
10 which the Court is not permitted to receive evidence.

11 You will receive -- we will present to you, or
12 the lawyers will present to you, all the evidence in the case
13 that is relevant and admissible. If I sustain an objection to
14 evidence, that means that the evidence falls below this floor
15 which is established under the rules of evidence. Too
16 [indiscernible] both, for some other reason, the evidence is
17 not capable of receipt.

18 Now, when a lawyer objects, you should not hold
19 that against him, if I overrule the objection. He's just
20 doing what's required under the rules of trials like this one,
21 but the long and the short of it, you should not consider
22 objections, you should consider the evidence that I allow.
23 And if I disallow evidence, you should forget about it. If a
24 witness starts to answer a question and an objection is made,
25 because he gets into an issue that is improper under the rules

1 of evidence, I'll address that issue, that objection, and if I
2 conclude the objection is proper, I'll strike the evidence,
3 which means, I'll remove it from the record and you'll have to
4 ignore it. I'll instruct you to ignore it, to disregard it.
5 If I do that, you must disregard it. And it's hard, but it's
6 the fair thing to do and that's really what you're here to do,
7 to be fair in your judgments about the case.

8 Now, testimony that I've excluded or told you to
9 disregard, as I said, is not evidence. It must not be
10 considered. Anything you may have seen or heard outside the
11 courtroom is not evidence and must be disregarded. You are to
12 decide the case solely on the evidence presented here in the
13 courtroom.

14 Now, there are two kinds of evidence, direct and
15 circumstantial. Direct evidence is direct proof of a fact,
16 such as testimony of an eye witness. Circumstantial evidence
17 is proof of a fact from which you may infer or conclude that
18 other facts exist.

19 Now, let me give you an example. If someone
20 walks into the courtroom in a rain coat with an umbrella, and
21 they're dripping wet, it is fair to assume that they were
22 outside and that it is raining outside. The wet umbrella, the
23 wet raincoat is circumstantial evidence of the fact that it's
24 raining outside, although this courtroom has no windows and
25 you cannot see the rain.

1 Direct evidence of rain would be being outside
2 or being at a window and being able to see the rain. And the
3 long and the short of that difference, you may consider both
4 direct and circumstantial evidence in deciding the case.

5 Now, I told you earlier, you must find from all
6 of the evidence, what evidence is believable. It will be up
7 to you to decide which witnesses to believe, which witnesses
8 not to believe and how much of any witness' testimony to
9 assessment or reject. I'll give you a guideline or two about
10 how you should do that now, but at the end of the case, I will
11 give more detailed guideline.

12 One thing you should consider is the extent to
13 which a witness's testimony is backed up or corroborated by
14 other evidence in the case. Or the extent to which a witness'
15 testimony is contradicted by contrary evidence in the case.

16 Another thing you may consider, and again, I say
17 you may consider, you don't have to, is the way the witness
18 handles questions on cross-examination. The government will
19 start its case by introducing evidence, witnesses and the
20 defense get to cross-examine those witnesses. See how the
21 witnesses respond to questions on cross-examination. Again,
22 just two guidelines for the way in which you assess the
23 contribute or believability of a witness.

24 Now, this is a criminal case, as you know.
25 There are three basic rules about a criminal case that you

1 must keep in mind. First, the defendants are presumed innocent
2 until proven guilty. The indictment against the defendants
3 brought by the government is only an accusation, nothing more.
4 It is not proof of guilt or anything else. The defenses start
5 out with a clean slate.

6 Second, the burden of proof is on the government
7 until the very end of the case. The defendant has no -- are
8 you okay?

9 UNIDENTIFIED SPEAKER: Sorry.

10 THE COURT: Do you need some water.

11 UNIDENTIFIED SPEAKER: No. I put a cough drop
12 in.

13 THE COURT: Second, the burden is on the
14 government until very end of the case. The defendant has no
15 burden to prove his innocence or to present any evidence or to
16 testify. Since the defendant has the right to remain silent,
17 the law prohibits you in arriving at your verdict from
18 considering that the defendants may not have testified.

19 Third, the government must prove the defendant's
20 guilt had beyond a reasonable doubt. I will give you further
21 instructions on this point later, but bear in mind that in
22 this respect, a criminal case is different from a civil case.
23 The burden of proof in a civil case is much easier to
24 establish. Again, the burden in a criminal case is to prove
25 every element of the offenses charged beyond a reasonable

1 doubt.

2 And now, I'm going to tell you about the charges
3 and the elements. The defendants Donnie Smith, Abid Stevens
4 and Maurice Quinn are charged in the indictment with
5 committing a robbery on or about March 22, 2019, which
6 affected interstate commerce, and aiding and abetting that
7 crime. That's count one of the indictment.

8 And they're charged in count two with using,
9 carrying and brandishing a firearm in relation to a crime of
10 violence for which they may be prosecuted in a court of the
11 United States. That is, the crime of robbery which affects
12 interstate commerce, as charged in count one of the
13 indictment. They're also charged with aiding and abetting
14 that crime.

15 I will now give you the essential elements of
16 each of those crimes. Interstate robbery, robbery affecting
17 interstate commerce, rather, and aiding and abetting, using,
18 carrying or brandishing a firearm, and aiding, abetting, there
19 are really four sets of the elements that the government will
20 be trying to establish in this case.

21 First, the elements of the crime of robbery
22 affecting interstate commerce as charged in count one of the
23 indictment are as follows, and before I get into them, I'm
24 going to cover this again, in detail, at the end of the case.
25 And I will give you, in addition to my oral instructions on

1 the law at the end of the case, I'll give you written copies
2 of the charge. So you'll have it in writing. If you wish to
3 take notes, certainly, you may, and I'll have further
4 instructions on note taking. What I don't want you to think
5 now, oh, my heavens, this is too complicated for me. It is
6 not. And we'll make it as easy as we can.

7 And now, the elements of the crime of robbery
8 affecting interstate commerce. First, and the government must
9 prove each of these elements beyond a reasonable doubt.
10 First, that defendants, Donnie Smith, Abid Stevens and Maurice
11 Quinn, took from employees of RD Grocery, the property
12 described in count one of the indictment, \$100 in United
13 States currency and a firearm, specifically, a Glock 26
14 9-millimeter semi-automatic handgun. Bearing serial number
15 BCXX649, loaded with eight live rounds of ammunition.

16 Second, that defendants Smith, Stevens and Quinn
17 did so knowingly and willfully, by robbery, and third, and as
18 a result of the actions of Smith, Stevens and Quinn,
19 interstate commerce was affected, delayed or obstructed.

20 Now, count one also charges defendants Smith,
21 Stevens and Quinn with aiding and abetting the crime of
22 interfering with interstate commerce by robbery in violation
23 of a provision of the United States Code. Under the aiding
24 and abetting statute, it is not necessary for the government
25 to prove that a defendant himself committed the crime with

1 which he is charged, in order for you to find him guilty of
2 that crime. A person who aids or abets another to commit an
3 offense is just as guilty of that offense as if he committed
4 it himself.

5 In and out elements of the crime of aiding and
6 abetting as charged in count one of the indictment are as
7 follows. First, that the substantive crime charged was
8 actually committed by another. That is, that someone
9 including one of the defendants obstructed, delayed and
10 affected interstate commerce by robbery. So someone must have
11 committed the crime.

12 Second, that Smith, Stevens and Quinn knew that
13 the offense charged was going to be committed or was being
14 committed by someone including one of them. Third, that
15 Smith, Stevens and Quinn knowingly did some act for the
16 purpose of aiding someone including one of them in committing
17 the specific offense charged with the intent that that someone
18 including one of them commit the specific offense. And
19 fourth, that Smith, Stevens and Quinn performed an act in
20 furtherance of the crime charged. That's the burden on the
21 part of the government, the government must prove each of
22 these essential elements for the crime of robbery affecting
23 interstate commerce and aiding and abetting the commission of
24 that crime beyond a reasonable doubt in order to obtain a
25 conviction. And they can obtain a conviction on count one if

1 they prove one set of elements beyond a reasonable doubt or
2 the other set of elements. There are two ways of committing
3 the crime of robbery affecting interstate commerce. The
4 second way being aiding and abetting.

5 Now, I turn to count two. It charges that on or
6 about March 22, 2019, the three defendants knowingly used,
7 carried and brandished and aided and abetted the use, carrying
8 and brandishing of a firearm. That is two black
9 semi-automatic handguns and a Glock 26 9-millimeter
10 semi-automatic pistol, bearing serial number BCXX649, loaded
11 with eight live rounds of ammunition, during and in relation
12 to a crime of violence for which they may be prosecuted in a
13 court of the United States and that crime is the robbery
14 affecting interstate commerce charged in count one of the
15 indictment.

16 In order for the defendants to be found guilty
17 of the crime of using or carrying or brandishing a firearm
18 during and in relation to a crime of violence, the government
19 must prove each of the following three essential elements
20 beyond a reasonable doubt.

21 First, that defendants committed the crime of
22 interference with interstate commerce by robbery as charged in
23 count one of the indictment. Second, that during and in
24 relation to the commission of that crime of the defendants,
25 knowingly used or carried a firearm. And third, that

1 defendants used or carried the firearm during and in relation
2 to the crime of robbery which affected interstate commerce.

3 Now, count two also charges the defendants with
4 aiding and abetting the commission of that crime. In order
5 for the defendants to be found guilty of aiding and abetting,
6 the crime of using or carrying a firearm during and in
7 relation to a crime of violence, the government must prove
8 each of the following elements beyond a reasonable doubt.

9 First, that the substantive crime charged was
10 actually committed by another. That is that someone including
11 one of the defendants knowingly used or carried a firearm in
12 relation to a crime of violence. Second, that the defendants
13 knew that the offense charged was going to be committed or was
14 being committed by someone including one of them.

15 Third, that defendants were active participants
16 in the crime of robbery affecting interstate commerce, and
17 also had advance knowledge that someone, including one of
18 them, would use or carry a firearm during and in relation to
19 the crime of robbery affecting interstate commerce.

20 And fourth, and finally, that defendants
21 performed an act in furtherance of the crime charged. And
22 finally, and I know this is an awful lot, the government must
23 prove those essential elements beyond a reasonable doubt. And
24 that you can prove that charged in the second count either by
25 proving that the defendants used or carried a firearm in

1 furtherance of a robbery affecting interstate commerce or that
2 they aided and abetted the commission of that crime by someone
3 else, including one of them.

4 All right. Now, a few words about your conduct
5 as jurors. I told you earlier, you must decide the case based
6 solely on the evidence presented in the courtroom. This
7 means, that during the trial, you must not conduct any
8 independent research about the case, the matters in the case,
9 and the individuals involved in the case. In other words, you
10 should not consult dictionaries or reference materials, such
11 the Internet, websites, blogs or use any other electronic
12 tools to obtain information about the case or to help you
13 decide the case. In short, do not try to find out information
14 from any source outside this courtroom.

15 Until you retire to deliberate, you may not
16 discuss the case with anyone, even your fellow jurors. Now,
17 let me explain the proscription. The prohibition on your
18 right to discuss the case among yourselves. You must wait
19 until all of the evidence is received, until you hear the
20 closing arguments of counsel and until you hear my
21 instructions on the law at the end of the case, before you
22 deliberate. It's unfair to start deliberating before all of
23 that evidence and the arguments of counsel and my instructions
24 are received. And that's really why you can't start talking
25 about the case in groups of two or three or five or however

1 how many. In short, you cannot begin your deliberations until
2 all of the evidence is received and until you have the things
3 that come at the end of the case, closing arguments and my
4 instructions on the law. That's the fair thing to do.

5 Moreover, you cannot discuss the case with
6 anyone else. You might ask, well, why is that? Well, the
7 reason is, you've got to decide the case, based solely what
8 you hear in the courtroom, what you read in the way of
9 exhibits and you cannot decide the case based on what someone
10 else might say about the case. So, if you go home at night
11 and your significant other or child or friend asks you, well,
12 what did you do today, and you say, well, I'm sitting as a
13 juror in a case, well, what's it about, and this person might
14 suggest to you something which did not come from you, that's
15 improper. And the same prohibition exists with respect to
16 anything that might be written about the case or anything that
17 might be broadcast on radio or television about the case.

18 Courtrooms are open, reporters are welcome. I
19 don't know whether they will appear in the courtroom, but if
20 anything happens to be broadcast on radio dealing with the
21 case, or broadcast on television dealing with the case, or
22 written about the case in the newspaper, disregard it. Put it
23 down. You can read that after you reach a verdict. And
24 again, the reason, you must decide the case based solely on
25 the evidence presented in the courtroom and my instructions on

1 the law, and not on the spin a reporter might put on the case
2 in a radio announcement or a television bit of news or what a
3 reporter might say in the newspaper.

4 You may not communicate with anyone about the
5 case on your cell phone, through e-mail, Blackberry, iPhone,
6 text messaging or on Twitter, through any blog or website,
7 through any Internet chat room or by way of any other social
8 networking websites including, Facebook, Myspace, LinkedIn and
9 YouTube. Finally, do not form any opinion about the case
10 until all the evidence is received. You should keep an open
11 mind until you start your deliberations at the end of the
12 case.

13 Now, a word about note taking. I've given each
14 of you a notebook. If you put your names on the notebook.
15 The notebooks should not be left in the courtroom. They
16 should be left in the jury room during recesses and at the end
17 of the day. My court staff will ensure that no one reads your
18 notes. They are your personal notes. They are not for
19 reading or sharing with anyone else.

20 A word of caution about note taking. Some
21 people are intense note takers. And they get wrapped up in
22 note taking, and in doing that, they might, I underscore the
23 word might, miss what a witness is saying or what an attorney
24 is saying and that is not good. I can remedy that myself, if
25 I happen to do that, and I take notes, if I miss something, I

1 just hold up my hand and have my courtroom deputies read back
2 or play back whatever it is that I might have missed. You do
3 not have that luxury. So my word of caution, do not in your
4 note taking, get so wrapped up in what you're writing that you
5 miss what a witness is saying or what else is going on in the
6 courtroom. And one last comment about note taking. Notes are
7 for your own personal use. They are not to be shared with
8 anyone else. And you should not be influenced by someone who
9 is a copious note taker in the event you are not a copious
10 note taker.

11 Now, I'm about to stop talking. The trial will
12 now begin. First, the government will make an opening
13 statement. It is an outline of what the government expecting
14 to be able to prove. Next, defense counsel may, but need not
15 make opening statements. I should add, opening statements are
16 neither evidence nor arguments. They are simply an outline of
17 what the proponent of the opening expects to prove.

18 Of the opening statements, the government
19 presents its witnesses, and counsel for defendant may
20 cross-examine them. You'll note that when the government
21 presents its witnesses, it may not ask leading questions. A
22 leading question is one which suggests the answer, like, isn't
23 it correct that after dinner, you went to bed? And the answer
24 is yes or no. That's a leading question. A leading question
25 for the most part is one that can be answered by saying no.

1 A non-leading question, same subject matter
2 would be, what did you do after dinner? The witness then has
3 to speak and say, I went to bed or I did whatever I did, but
4 the witness does the speaking, more of the speaking in a
5 question that is non-leading. The proponent of a witness may
6 not ask leading questions.

7 After the government presents its evidence, the
8 defendants may, but need not present their evidence. And if
9 they present witnesses, although they don't have to, but if
10 they do, the government may cross-examine them. After all the
11 evidence is in, the attorneys present their closing arguments.
12 In their closing arguments, they will argue to you as to why
13 they think you should find in favor of their client. The
14 government counsel will argue that you should convict.
15 Defense counsel will argue to the contrary. And after all of
16 that I will give you my instructions on the law. And I'll
17 deliver them orally. I'll also give you written instruction
18 with a detailed table of contents, so if you have any
19 questions about anything in the instructions you should be
20 able to go with a chapter and verse without any difficulty at
21 all.

22 And now I'm going to stop talking. Mr. Eckert,
23 it's a little after 12. I think we should start the openings
24 now. We're not going to finish them before lunch. How long
25 do you expect to be?

1 MR. ECKERT: Not very long, around 10 or 15
2 minutes.

3 THE COURT: All right. We'll start and before I
4 let you go for lunch, I'm going to give you an idea of what
5 our schedule will be today and for the rest of the week. Mr.
6 Eckert, you may --

7 MR. ECKERT: Thank you, Your Honor. May I enter
8 the well?

9 THE COURT: You may.

10 MR. ECKERT: Thank you.

11 - - -

12 OPENING STATEMENT

13 - - -

14 MR. ECKERT: On March 22, 2019, Maurice Quinn
15 tried to pull off a scam at a mom and pop store in Northwest
16 Philadelphia, and he got caught. The store clerk looked at
17 the money, said it was fake.

18 Mr. Quinn wouldn't take no for an answer. What
19 he did was he left the store and he came back with Mr. Smith
20 and Mr. Stevens and he came back with Smith and Stevens,
21 because they both had guns. They both had firearms.

22 When Mr. Quinn goes back in the store, he stands
23 in the doorway. A few seconds later, Mr. Smith comes through
24 the door, takes one step to the right and immediately draws a
25 firearm from his waistband and points it right at the clerk.

1 Mr. Stevens, at the same time draws his firearm
2 and he keeps it down at his side. These three gentleman
3 advance, that is they backed the store clerk, literally into a
4 corner where he has nowhere else to go.

5 You'll hear evidence that the store for a few
6 defendant reasons also keeps a firearm in the store for
7 protection. The store clerk's firearm is at his side. It's
8 either in his pocket or at his side the entire time this whole
9 interaction goes on.

10 They forcibly take his firearm, Mr. Smith, with
11 his own hand as Mr. Smith's gun with his hand is pointed at
12 his head and Mr. Stevens' gun is pointed at the clerk's head,
13 Smith takes the firearm from the clerk and puts it in his
14 pocket.

15 At this point, Quinn goes back behind the
16 register and he tries to open up the cash register, but he
17 doesn't know how. He can't figure it out. So he comes back
18 out, physically goes up to the store clerk and points him back
19 behind the register and he makes the clerk open up the
20 register where the clerk then takes out \$100, hands it over to
21 Mr. Quinn, and they leave the store.

22 Now, the scam that we have in this case is that
23 the defendant, Mr. Quinn, he goes up to the ATM, and he takes
24 out \$20 from the ATM. And he goes up to the counter and he
25 gets a pack of -- he buys a pack of cigarettes. And he gives

1 the clerk the 20-dollar bill. And the clerk, he's worked in
2 the store for about three years, he's not fluent in English,
3 but he's worked in the store for three years, so he has the
4 ability to communicate. And he feels the money, he looks at
5 the money and says, that's not real money. And Mr. Quinn
6 says, well, I just got \$100 from your ATM, but in fact, he had
7 only taken out 20. And he throws the money on the counter,
8 and the clerk knows that this situation is a little bit beyond
9 what he's going to be able to handle, so his first move is to
10 call his boss, the owner of the store, who's fluent in both
11 Spanish and English, because he hopes that he can put her on
12 the phone and she'll be able to talk to Mr. Quinn and explain
13 the situation. He tries to do so. Mr. Quinn takes the phone
14 for 15 to 20 seconds, is not satisfied whatsoever. He
15 continues to argue and argue with the clerk. When the clerk
16 is not satisfying him, when he's telling the clerk give me the
17 money, give me the money, give me the money, the clerk is not
18 satisfying him, he's not just going to hand over the money,
19 Mr. Quinn comes back around the counter, physically gets in
20 the face of the clerk, is pushing him -- is pushing
21 merchandise, literally that's falling on top of the clerk, the
22 clerk is getting again, backed into a corner, Mr. Quinn says,
23 give me the Glock. Give me the Glock, because Mr. Quinn is
24 now about two feet from where the store keeps their firearm
25 for protection. The store clerk has no other choice at this

1 point, he takes the firearm and he holds it as his side. And
2 he holds it at his side and it never leaves there. And what
3 that does is it causes Mr. Quinn to back up.

4 Now, Mr. Stevens is also out of the store by
5 this point and he's hearing this argument go back and forth
6 between Mr. Quinn and the store clerk. Both Mr. Quinn and Mr.
7 Stevens tell the store clerk, I'll be back. I'll be back.
8 That is, they knew what was about to happen. They knew what
9 they were going to do. Stevens argues with the clerk for
10 another 30 seconds, just give my guy the money. Give my guy
11 the money. They then both leave.

12 You'll see video evidence of Mr. Smith going up
13 to his car, getting something out of his car and, coming back
14 to the store. We will prove to you beyond a reasonable doubt
15 that that at the second Mr. Smith enters that store, he knows
16 exactly what is about to happen. And the reason for that is
17 you'll see on the video, within literally two seconds of Smith
18 going inside of that store, he draws a firearm right out of
19 his waistband and points it right at the clerk.

20 The intent here as to what this was is
21 abundantly clear. There are three people, two of whom are
22 armed with firearms. They are forcibly taking property from
23 another person. That, ladies and gentlemen, is a robbery and
24 that's what the evidence will prove in this case.

25 They are advancing on this person. They are

1 backing him into a corner to take his property. They are
2 doing that at gunpoint. You will see a great deal of evidence
3 that everything that happened in this case was at gunpoint.
4 Nothing was handed over, just because there was some kind of
5 misunderstanding or some kind of dispute. They was handed
6 over because two people pointed firearms at the store clerk's
7 head and he believed that he had no other choice than to hand
8 the money over.

9 There are two charges in this particular case.
10 The first is robbery. That is, that an item in interstate
11 commerce was obstructed or delayed or affected. What that
12 means is that this business transacts in interstate commerce.
13 It sells things that are manufactured outside of Pennsylvania.
14 And you'll receive evidence about that. That the business was
15 disrupted. You'll see evidence on the video that the business
16 was not able to conduct its business as a store while this was
17 going on. That this whole thing obstructed their ability to
18 do their business and that proves the interstate commerce
19 nexus or element.

20 We will prove to you that the actions of the
21 defendants are purposeful, that is, that they knew what they
22 were doing. And that the time they entered the store, they
23 knew what was about to take place. Nothing happened by
24 accident in this case.

25 The second charge is that they carried and used

1 firearms in doing so. That is, that they were able to commit
2 this crime through the carrying of firearms and there's two
3 separate ways that that applies. The first, is that Mr.
4 Stevens and Mr. Smith both had their own firearms that were in
5 their possession and that they immediately pulled out as soon
6 as they entered the store, but they also used the victim's
7 firearm to facilitate their crime. That is that Mr. Smith, in
8 taking the firearm that belonged to the store and putting it
9 in his pocket, that's how he facilitated this crime of
10 robbery. That also will prove Count 2 in this particular
11 case.

12 For Mr. Quinn, although he never actually
13 possessed a firearm, we will prove to you beyond a reasonable
14 doubt that he had advanced knowledge that firearms would be
15 used. He had advanced knowledge that before he committed the
16 actual robbery, before he tried to get the money out of the
17 register, before he told the victim, and pointed the victim at
18 the register and sent him back to the register, he knew the
19 firearms had been displayed. He had had an ample opportunity
20 to know that firearms were involved in this case, they would
21 been displayed and the only reason this robbery was going to
22 be successful was because they were using firearms, that is he
23 had had advanced knowledge of the crime that was about to
24 occur.

25 Now, in case that's not enough to demonstrate

1 exactly what happened in this case, the government will also
2 present to you evidence of a high-speed chase that the only
3 reason Mr. Quinn and Mr. Smith left the store is because they
4 heard police sirens. You'll receive evidence that it's clear
5 that they knew that the police were on the way. Mr. Quinn,
6 literally pulls Smith out of the store. He grabs him and
7 physically pulls him out of the store.

8 You'll see evidence that Mr. Smith -- the police
9 officer, a Philadelphia police officer tries to stop him,
10 walks up to his car, tries to open the door, tries to take him
11 out of the car and Mr. Smith drives off. He drives off for
12 miles, upon miles, because he knows that what he just did is a
13 criminal act and it will demonstrate that he was completely
14 conscious of what he did. He was conscious that his actions
15 were the commission of a crime.

16 What this case is, ladies and gentlemen, is that
17 three people enter a store, two of them are armed with
18 firearms, they point those guns right at a person's head, and
19 they use that to take money out of the cash register. That is
20 a robbery by any definition and that's what we'll prove to you
21 in this case. That a robbery occurred, and that they used and
22 carried firearms in the commission of that crime.

23 At the conclusion of this case, my colleague Ms.
24 Martin will stand here and she will ask you to return the only
25 verdict that's consistent with the evidence that we presented

1 to you and that is guilty of both counts. Thank you.

2 THE COURT: Thank you. Ms. Meehan.

3 MS. MEEHAN: Thank you, Your Honor.

4 Good afternoon, members of the jury. I
5 represent Maurice Quinn, the gentleman in the gray shirt here
6 and you will become very familiar with Mr. Quinn. You'll see
7 him on video. I believe both the government and the defense
8 will be showing a good portion of the video, if not all of it.

9 This was not a robbery. There was no taking,
10 and you'll hear that word as part of the jury instructions
11 when His Honor instructs you at the end of the case.
12 Something has to be taken. This was an argument that got
13 ugly, got very ugly, but you will see and hear for yourselves
14 from the most reliable, the most credible witness and that is
15 the store video.

16 You will see that on the RD store video, RD is
17 the name of the grocery store, my client, Maurice Quinn, was
18 in the store trying to give back counterfeit money, \$100 in
19 counterfeit money that came from RD Grocery's store ATM, the
20 ATM in their store. He's just been told -- he's trying to buy
21 cigarettes. This is on March 22nd, and he's just been told by
22 the store clerk, whose name is Mr. Ventura, he's just been
23 told by the store clerk, I can't take this money. This is
24 counterfeit money, and Mr. Quinn argues with him, this money
25 came from your machine. It's not counterfeit. I got it from

1 your machine, whereupon, Mr. Ventura pulls out a special pen
2 and demonstrates for Mr. Quinn that yes, this pen shows that
3 the money, at least this \$20 bill is counterfeit and you will
4 see in several places on the video, Mr. Quinn pushing the
5 money at him, trying to give him the money, say, well, then
6 you owe me \$100. This came from your ATM machine, you owe me
7 \$100. That is not robbery. He was very insistent and in
8 fact, he was at times physical and he was very foul-mouthed,
9 but he was not there with any intention to rob the store.

10 On March 22nd, Mr. Quinn went into the RD
11 Grocery and you'll hear from the government's own witnesses
12 that he is in the store everyday, everyday, several times a
13 day, in fact. And he uses the ATM frequently. He hasn't had
14 a problem with the ATM machine before March 22nd. He's there
15 everyday as part of the fabric of his life. The store clerk
16 knows him. The store owner knows him. Another individual who
17 was working in the store who you'll hear from, Mr. Sanchez,
18 knows Mr. Quinn. This is a daily thing for him to be in this
19 store and everyone knows everyone. He would not rob the
20 store. It's part of his -- the fabric of his life.

21 So -- and he had never taken anything from RD
22 Grocery that wasn't his. So you will hear from Mr. Ventura,
23 this interaction with Mr. Quinn, and you will see for
24 yourselves on the video, there are several minutes where Mr.
25 Quinn is trying to push the money and give him the money and

1 demanding the money from the register, saying you have to give
2 me -- you have to make good on what the store ATM machine gave
3 me, this counterfeit money.

4 And the store clerk, Mr. Ventura says, it's not
5 my machine. It's not -- the store doesn't own the machine.
6 It's not my problem. And Mr. Quinn gets angrier and angrier.
7 Mr. Ventura calls, uses his own cell phone and calls the store
8 owner and you'll see that on the video. And then, in fact, he
9 puts -- Mr. Quinn -- he hands his phone -- and you'll see
10 this, I think it's at -- the video says, it's military time,
11 I'm not great with, but 16:50 and 30 seconds. I think it's
12 4:50 and 30 seconds, and Mr. Ventura hands his phone over to
13 Mr. Quinn. And Mr. Quinn is talking to the store owner,
14 trying to get a resolution to this and still being told, it's
15 not our machine. I'll have to call someone else. We're not
16 going to settle this today. We can't help you. Was he
17 polite? No. Was he a jerk? Most certainly. He was very
18 foul-mouthed. Could he have handled this better? Most
19 certainly. Most of you probably would've handled it quite
20 differently. But if you ask Mr. Quinn today, right now about
21 his conduct, I think he would agree that he was unpleasant and
22 a jerk on that day. But that does not make him guilty of
23 robbery.

24 Mr. Stevens was also in the store watching Mr.
25 Quinn also argue with the cashier. You will see on the video,

1 customers going into the of the store, standing in line,
2 holding potato chips, because they were watching an argument.
3 That's what this was, this was an argument. It was a dispute.
4 Mr. Quinn lost his temper. He wasn't willing to wait for
5 someone to make good on the ATM money at some point in the
6 future. In his mind, he was never going to see his
7 hard-earned \$100 again. So he keeps on arguing and at one
8 point he goes behind the counter and he's yelling and cursing
9 and he is, in fact in Mr. Ventura's face.

10 And you will see Mr. Ventura grab a gun from the
11 shelf behind the counter. And he holds it at his side and Mr.
12 Quinn backs off. He did not have a gun. He did not have a
13 gun. He was unarmed. He was there and trying, repeatedly for
14 several minutes to exchange the money, not take the store 's
15 money, but exchange what was in the register for what came out
16 of that store's ATM machine. From his own bank account, you
17 will see from records that will be introduced, that he, in
18 fact had a bank account with deposits being made and he -- and
19 they are ATM transactions from the RD Grocery Store. In fact
20 11 of them, I think between the end of December to the date in
21 question of March 22nd.

22 After Mr. Ventura grabs his gun, Mr. Quinn
23 leaves the store for about a minute. You'll be able to see
24 for yourselves what the timing is on the video. Still very
25 upset, he's still very frustrated. He's unarmed. He has no

1 gun. And he still believes that he has been cheated by the
2 store. So at some -- he comes back in, it's 16:55:16, 4:55:16
3 all and you'll -- you'll see that on the video. He comes in
4 by himself. Mr. Smith comes in at 16:55:47. So this is
5 really not quite seconds later. There's a good period of time
6 between when Mr. Quinn comes back into the store and when Mr.
7 Smith comes in and then Mr. Stevens follows him ten seconds
8 behind that at 4:55:57.

9 Mr. Quinn, goes again, behind the counter to get
10 his \$100 bill -- \$100, excuse me. And he's, again, trying to
11 open -- he's trying to open the register, and Mr. Ventura's
12 off to the side. And she's not having any luck getting the
13 register open. He's still demanding his money. I want my
14 \$100. The store, you owe, me \$100.

15 Ultimately, Mr. Ventura comes to the register
16 and you will see him on the video, counting out \$100, five \$20
17 bills. Exactly the amount of money that Mr. Quinn was trying
18 to hand him earlier. He's try -- you'll see, at the counter,
19 at the beginning of the video, Mr. Quinn is trying to hand Mr.
20 Ventura five \$20 bills that Mr. Ventura is saying, these are
21 counterfeit. You can't use these to buy cigarettes here.
22 These are counterfeit.

23 And you will see that he counts \$100, not a
24 penny more. Shortly, after that, after Mr. Ventura gives the
25 \$100 to Mr. Quinn. He goes back around the corner. And he

1 leaves. And in fact, he passes the store owner on his way out
2 and he says, got my \$100, he's a little bit more foul-mouthed,
3 and he leaves the store.

4 Mr. Stevens is still in the store and Mr. Smith
5 is still in the store for a little bit more time. Ultimately,
6 you'll see Mr. Stevens is in the store, there are customers
7 there, and he is talking to the three store employees, the
8 store owner, Mr. Ventura, and Mr. Sanchez, another store
9 employee. And it isn't until 17:05:07, five minutes after
10 5:00, so long after Mr. Quinn has left, that Mr. Stevens, and
11 you will see this on video, Mr. Stevens shakes Mr. Ventura's
12 hand. They shook hands after this robbery, they shook hands.

13 Mr. Quinn did not unlawfully take money from the
14 grocery by means of force, threat or fear, and he was unarmed.
15 He did not intend to take anything that did not belong to him.
16 He was simply trying to have the store make good on what they
17 should've made good on in his mind. The money that came from
18 the store's ATM machine that they make money from, they make a
19 profit from.

20 Should he have handled the situation like this?
21 No. Did he commit a robbery? No. So that's count one of the
22 indictment. Count two, charges Mr. Quinn with aiding and
23 abetting the use and carry of a gun during and in relation to
24 a robbery. And you know and you'll see, you'll see Mr.
25 Quinn's hands. You'll see that he doesn't have a gun. You'll

1 see he's unarmed. But the government argues that because Mr.
2 Smith and Mr. Stevens had guns that therefore Mr. Quinn is
3 guilty of aiding and abetting the use and carry of a firearm.
4 But the government cannot establish a taking. That's really
5 the main focus here. They can't establish the robbery. And
6 if they can't establish the robbery in count one, Mr. Quinn is
7 certainly not guilty of count two of aiding and abetting, the
8 use and carry of a gun during a robbery. There's no robbery.
9 There's no use and carry of a gun in furtherance of a robbery.

10 Apart from that, and this is critical, the
11 government wants you to believe that Mr. Quinn had advanced
12 knowledge of Mr. Smith and Mr. Stevens coming in with guns.
13 There's really no evidence of that and I urge you to look at
14 the video and the timing of the video when Mr. Quinn is
15 standing there, he comes in first and it's 25 or 30 seconds
16 after that. It's not seconds, it's not they're storming in,
17 the three of them together, into the entrance. There's only
18 one entrance into the grocery store. They -- Mr. Quinn comes
19 in and then it's about 25 or 30 seconds later, Mr. Smith comes
20 in and then sometime after that about ten seconds later, Mr.
21 Stevens comes in.

22 Judge DuBois will instruct you at the end of the
23 trial what the law is in order for you to find Mr. Quinn an
24 unarmed man guilty of aiding and abetting the use and carry of
25 a gun. It is the government's burden, their entire burden to

1 prove beyond a reasonable doubt that Mr. Quinn robbed the
2 store, count one, and that Mr. Quinn assisted or facilitated
3 the use and carry of a gun during the robbery.

4 The evidence will show that Mr. Quinn did not
5 commit a robbery. The evidence will also show he did not
6 assist, facilitate or encourage Mr. Stevens or Mr. Smith to
7 brandish guns. Mr. Quinn is not guilty. Thank you. Thank
8 you, Your Honor.

9 THE COURT: Thank you. Mr. Wittels, how are
10 we --

11 MR. PATTERSON: I think it's going to be Mr.
12 Wittels, Your Honor.

13 THE COURT: Mr. Wittels.

14 MR. WITTELS: Your Honor, ladies and gentlemen
15 of the jury, good afternoon. This will be my first
16 opportunity to speak to you. I will be brief, although you
17 know when a lawyer says he'll be brief, you better watch out.
18 Whoever -- hardly ever really brief. And then at the end, I
19 will get to argue to you.

20 The essential question in this case for you is
21 going to be was this a robbery or was it an argument. You may
22 be in your mind whether you've seen it on TV or you know it
23 from experience of other people what a robbery looks like or
24 you've seen it on the news. Somebody dashed into a store,
25 maybe he's got a mask on, maybe they don't, they point a gun,

1 give me the money. And the store owner or the clerk opens the
2 register and takes out all the money and the robber then with
3 money in hand dashes away.

4 You're not going to see that in this case.
5 You're going to see people arguing back and forth. You're
6 going to see my client staying there, trying to resolve the
7 situation, trying to make peace. You'll see him there, even
8 as the police cars arrive on scene and go off into the
9 distance chasing Mr. Smith.

10 You'll see him stay in that store for a long
11 period of time. So the question you're going to -- and it's
12 not like he's a stranger. He lives on the block. You'll see
13 from the interaction of the people that they all know each
14 other. What kind of robbery is this?

15 So what you're going to have to focus on is
16 intent. Was there an intention to rob? Was there an
17 intention to have an argument? Or was there an intention to
18 resolve a dispute?

19 Now, the government is going to March in a lot
20 of witnesses, but you need to focus on not the quantity of
21 witnesses, because there's a saying in opera, they also carry
22 a spear, maybe it's large cast and people, they don't have
23 staying roles, they just come on the stage and off the stage,
24 so they're going to March in a lot of witnesses. They're
25 going to be on the stand. We won't have many questions of

1 most of them and then they'll March off, because things
2 aren't -- some -- most of this is not in dispute, you'll get
3 to see the videotape. And in this case, you know that saying,
4 a picture is worth a thousand words, well the videotape is
5 worth more than that. Unfortunately, there's not sound, but
6 you'll be able to judge by people's body language, by where
7 they stand, about how they interact with each other, about how
8 long they're there, you know, what's going on here. So the
9 video will tell most of the tale.

10 And you'll also get to decide whether or not the
11 witnesses who were there are testifying in a manner that's
12 consistent with what you see on the tape or not. Whether
13 they're embellishing or not. Because credibility is going to
14 be for you to judge, not for us, but for you to decide is this
15 person telling me the truth. How do you do that? Common
16 sense and you're life experience. Time and time again, when
17 someone has been talking to you outside of the courtroom
18 setting, you get to decide whether or not they're telling you
19 the truth, being accurate or whether or not you have some
20 doubt, so that's all you need. Those are the tools you need.
21 The judge will instruct you as to the law and you'll apply it
22 to the law as the fact -- to the facts, because you are the
23 judges of the facts, nobody else.

24 So focus, really, for my client, who's Abid
25 Stevens, and I don't represent anybody else. I just represent

1 Abid Stevens. So focus on what he does and how he acts to
2 decide whether or not he's guilty. Focus on what his role is,
3 what he seems to be about, whether or not this is an argument
4 that he's facilitating or trying to resolve, and whether or
5 not he's committing the crime of robbery, not some other
6 crime, because what you will see on the videotape and there's
7 no dispute about this, is a good deal of waiving around a gun
8 and pointing of guns, by everybody, including the store clerk.
9 It's like the wild west. And what the heck is going on here.

10 So what you also have to decide whether or not
11 the weapons were used in furtherance of the crime of robbery
12 or of any crime. And I think at the end of the day, you'll
13 find -- let me just say this, when the government opens, and
14 tells you their version of the case, it's their version. It's
15 not necessarily what happened. If that were so, we wouldn't
16 need a trial. We'd just have the government say, this is what
17 happened. We sit down, you go out for a minute and come back
18 with a verdict of guilty. It's kind of like not having
19 witnesses at the impeachment. Well, that's a political
20 statement, so, forget that.

21 That's not how cases work. Not at all. We
22 wouldn't need you if that's how it worked, but we need you and
23 we need you desperately, to sit in judgment and decide what
24 the truth is. In the end, what the government told you in
25 their opening are a series of promises. And I predict to you

1 that they will not keep their promises.

2 Be very careful about what is not disputed and
3 what is disputed, because it's what it is in dispute that you
4 will have to focus on. The evidence will demonstrate to you
5 at the end of the day that my client, Abid Stevens is not
6 guilty. Thank you.

7 THE COURT: Thank you, Mr. Wittels. I think
8 what we'll do now, ladies and gentlemen, is recess for lunch.
9 It's twenty-five minutes of one. We'll recess for an hour. I
10 want you to assemble in the jury room, a little bit before
11 twenty-five of two, and we'll -- I hesitate to promise, but
12 I'm going to, I promise we'll get started promptly with the
13 government's evidence. We've had -- we've heard the -- oh,
14 no, we haven't heard from Mr. Patterson.

15 MR. PATTERSON: Yes, Your Honor. And again, I'm
16 going to be brief. I know probably everyone's hungry, but if
17 we can get it done now, I think that will be more judicious.

18 THE COURT: I agree, and we'll recess a little
19 later than twenty-five to one, but not much later. Mr.
20 Patterson.

21 MR. PATTERSON: Thank you. May it please the
22 Court, counsel. Ladies and gentlemen, now, I feel like I'm
23 under pressure here.

24 THE COURT: No pressure, Mr. Patterson.

25 MR. PATTERSON: Thank you. I have notes. I

1 don't use them. All the highlighters get confused. So
2 anyway, to be clear, there are three attorneys, there are
3 three defendants. I am here specific to represent Donnie
4 Smith. Some questioning during the cross-examine, witnesses
5 may overlap into another defendant, but I just want the jury
6 to be clear, I am here to represent Donnie Smith.

7 So as the judge said, His Honor said in the
8 opening instructions, there's certain things that you have to
9 do in a criminal case. You've got to decide this case based
10 upon the evidence and based upon the testimony, and based upon
11 the jury instructions. That is the law that you are to apply
12 to the facts in determining whether or not somebody is guilty.
13 And again, that guilty has got to be beyond a reasonable
14 doubt.

15 The definition of reasonable doubt, His Honor
16 will give you at the conclusion of the case. It's a criminal
17 case, and the doubt is significant. They have to prove beyond
18 a reasonable doubt and that definition will be given to you.

19 So one other thing though, the evidence, the
20 testimony, and the jury instructions, you get to use your
21 common sense. You come here with your life experiences, and
22 you get to use your common sense and use your common-sense
23 relationship to the facts and relationship to the facts of the
24 law. That's what we all do.

25 This case is going to really call upon your

1 common sense. And I will tell you in my closing. See, the
2 opening argument is, as my colleagues have said, the opening
3 statement, rather, not an argument, it's a statement, it's
4 like, it's my opportunity to say, hey, this is what I think
5 the evidence will show, and at the end of the closing
6 argument, then I get up there and say, look, I told you.

7 So I'm at a disadvantage, because whatever I
8 say, what I think they're going to prove in the opening and
9 they don't prove it, then they're going to hold that against
10 me. So in the next couple minutes, I'm going to tell you what
11 I know that they're going to prove, but what's going -- what
12 the evidence is going to show, rather, and maybe, if I'm not
13 so sure, I'll say what I believe the evidence will show.

14 Video, everyone is going to be talking about
15 this video. Video is the holy grail in a criminal case. It's
16 either the good holy grail or the bad holy grail. As a
17 defense attorney, I'll get some preliminary, you know,
18 discovery, and it said there's a video. And then I start
19 cringing, I'm like, oh my God, what am I going to do. They
20 have video. And this is good video. This is like real-time,
21 color, crystal clear video.

22 When my son's bike was stolen, I said to the
23 police officer, there's video, it was like Casper The Friendly
24 Ghost took it. It was like a shadow, a grainy shadow, you
25 couldn't tell anything. That's not the case in this

1 particular situation.

2 In fact, in the video they're going to show,
3 you're going to see a screen, probably smaller than that, and
4 the screen, whoever walks into the store, and the store is
5 small, but anybody who walks in the store is going to see the
6 screen. And the screen has six -- I believe it's 16 different
7 separate pictures. So it's a real-time recording of what
8 you're doing in the store. Anybody who goes into that store
9 can see this screen with the 16 cameras rolling, and the 16
10 cameras recording. They're not hiding this in the back. When
11 you go in that store, you know you're being recorded, period.
12 And that's important. I'm going to tell you, real quick.

13 What this video is going to show is that my
14 client's wife is in the store. My client, when this incident
15 occurred, and again, it's not a robbery until you decide it's
16 a robbery based upon the evidence and the testimony at the
17 conclusion of the case. When you decide it's a robbery beyond
18 a reasonable doubt, then it's a robbery. Anybody comes up
19 here during the course of this trial and said there's a
20 robbery, it's not until you decide it is.

21 So you'll see two people in Muslim garb --
22 garments, rather, my client, and his wife. The video is going
23 to show that at a certain time and it's very clear what the
24 time is, my client's wife is in the store waiving around a
25 dollar to the clerk trying to get some -- trying to buy

1 something.

2 The video is going to show that it's my client's
3 wife, the store clerk and a couple of people who work there.
4 I think his name is Emmanuel, maybe somebody else, but again,
5 I believe, I'm not certain, but the video will show. So --
6 and when my client's wife is in the store, a foot away from
7 her, on the video is the store clerk with a gun, a gun at his
8 side. My client is not in the store yet, but his wife is,
9 with a store clerk with a gun. Then you're going to see the
10 video, and it's not pretty, it's not. Videos don't lie.

11 My client comes in, sees his wife standing
12 there. Sees the clerk with a gun at his side, takes her,
13 pushes her out the door. She's safe now, in his mind. And
14 then he pulls the gun and he points it at the clerk who still
15 has a gun, but now, when he comes in, his friends are in
16 there, Mr. Quinn and Mr. Stevens. This is what the evidence
17 is going to show.

18 Then, very clear, Donnie Smith points the gun at
19 the clerk, he disarms the clerk. He takes the gun from the
20 clerk and he puts it in his right pocket. It's a Muslim garb.
21 It's a long gown that men wear and it's got pockets. All
22 clear on the videotape. I'm not making this up.

23 He puts the gun in right pocket. My client is
24 lefty. You're going to see two separate situations where he
25 points his gun. He points his gun with his left hand. And we

1 know that once that gun is in his pocket from the clerk, that
2 gun stays in his pocket. That gun never comes out again,
3 because he's a left and the gun is in his right pocket. This
4 is all clear on the videotape.

5 My client takes off. The police are coming. He
6 gets in his car. He takes off. That's on the videotape.
7 That's not as clear. That's a pole camera operated by the
8 Philadelphia Police Department. That's kind of like a --
9 that's grainy, what you usually see, not as clear, but he
10 takes off. And he's engaged in a chase and he crashes the
11 car, and he takes off.

12 Now, I believe when the judge gives you the
13 instructions of the law to apply, that one of the instructions
14 is going to be flight is consciousness of guilt. That's a
15 jury instruction that you tell the jury, it's like look, this
16 guy took off, so, the mere fact that he took off, he's
17 consciously doing something, because he knows he's guilty.
18 That's a horrible charge for a defense attorney. It's a
19 horrible charge for a defense attorney, but not in this case,
20 because from the very start to the very end of what my client
21 did in that store, on that day, and that time, it's all on the
22 videotape.

23 The consciousness of guilt, that's a good charge
24 when there's like circumstantial evidence when you really
25 don't know what the guy did, but then, well, he took off, so

1 maybe we can fit the pieces together, use our common sense and
2 come back with a verdict of guilty. We don't have it here.
3 It's clear as day as what he did. He took off because he just
4 took off.

5 Now, what they find is when he -- when they come
6 upon the car, the police, seconds later, they get a search
7 warrant, they search the car and they find the clerk's gun, in
8 the car. My client's not there, and they find his hat.
9 Donnie Smith was in the store. I'm not going to say that the
10 DNA swab, the having a gun, it's his hat, it says legend on
11 it, he was wearing it in the store. It's his hat. It's the
12 clerk's gun, because they were able to do the -- you'll hear a
13 bunch of evidence about the clerk's gun, but what they do with
14 the clerk's gun is they do a functionality test on it, I
15 believe. I'm pretty sure they will, the evidence of that.

16 They do a functionality test, because they want
17 to make sure that this gun is functional. That this gun will
18 propel a projectile. And I believe the testimony is going to
19 elicit that it was a functional gun, and it was loaded with
20 eight live rounds. Who had the gun? Who had the only gun
21 that they can prove that was loaded and was functional with
22 eight live rounds? The clerk, Joel [ph].

23 The clerk that had the functional eight-round
24 loaded gun, we don't know if one was in the chamber or not.
25 I'll ask that later on. The guy with the loaded gun that we

1 will know is a loaded gun and functional, it was two feet from
2 my client's wife, and then was with my client's friends until
3 he was disarmed by my client.

4 There's a lot of words of firearms and weapons
5 and pistols in this case, and you will see something that
6 resembles a firearm in the hands of my client. I'm pretty
7 sure they can't show that that whatever was in his -- with his
8 hand was a functional firearm and could propel a projectile,
9 that they can prove that the only person that had that gun
10 out, not in their pocket like Donnie Smith did, was the store
11 clerk.

12 So this was where the common sense comes in --
13 and the \$100 thing, again, if you're going to rob a store and
14 you got three guns, then rob the store. Don't just take the
15 \$100. You'll see, when Joel opens up the cash register,
16 there's money in there. There's a lot of money in there. You
17 know what he does, he takes 100 bucks. Thanks, I'm good. I'm
18 out the door.

19 So I'm almost done. When I come back on my
20 closing argument, I'm going to ask you these questions. I'm
21 going to ask you now, and think about these questions. When I
22 come back, when you know all what the evidence and the
23 testimony is.

24 Number one, who brings your wife to an armed
25 robbery? Number two, who robs a store when you go in there

1 and you see your face on 16 smaller different screens, in
2 broad daylight? The store owners, I think Joel and Emmanuel,
3 and I think the store -- the actual store owner, they saw the
4 other two gentleman who are seated here. They've seen them
5 numerous times. I mean, that's another -- that's for another
6 attorney -- another colleague to say, why rob the store when
7 you're in there all the time without a mask on, but nobody
8 knows Donnie Smith, he's never been in there, but he goes in
9 there without a mask on, and when he's pointing the gun, he's
10 pointing the gun like this and the screen is there, so he
11 knows he's being recorded. He's not there to rob the place.
12 He's there, because his wife's in the store, and a probably
13 very dangerous situation, and then he extracts her and now his
14 friends are in the store in a very dangerous situation.

15 Once he takes that gun, puts it in this right
16 pocket, he's cool. The video is going to show he goes back to
17 where like the cashier is, and it's a small store and he hangs
18 out there with the clerk's gun in his right pocket, and
19 whatever he had, it looks like a gun, whether it is or not, we
20 don't know, in his left pocket. He never takes it out. He
21 never says to the store clerk who's standing right there and
22 Emmanuel who's the cook, hey, listen, I'm here loaded for
23 bear, and give me all you got, doesn't do anything.

24 This is an argument over somebody getting fake
25 money, not a robbery. As it comes to Mr. Smith, he didn't

1 take anything. He didn't get \$100. He didn't take a bag of
2 potato chips with the two allegedly -- the one gun that we
3 knew he had in his pocket, and the other gun that we don't
4 know what it really is. Doesn't take anything. And it isn't
5 like, okay, I don't have time to take anything, because the
6 police are coming. He's there for a couple of good minutes,
7 three, four, five, and that will all be on the video.

8 So he's hanging out with Mr. Stevens and then he
9 goes, because the police come and he's like, I might get in
10 trouble here, and he flees. He's not charged with fleeing and
11 alluding. That's not a charge. The government wants to use
12 that as, well, he's fleeing and alluding because he knew he
13 did something wrong. He left because whatever. He got
14 nervous, he didn't -- he just took off. And I got to own
15 that, because he did what he did.

16 So anyway, at the end when I come back here, I
17 will ask you for what I think, and I'm not the jury, the only
18 decision could be on this case, if you answer these questions
19 that I just posed to you, it doesn't make sense. You can't
20 reconcile what my client did to the charge of a robbery, with
21 a gun [indiscernible] I don't think you can. That's up to
22 you.

23 I would submit to you, at the appropriate time,
24 that they cannot prove those elements beyond a reasonable
25 doubt. Thank you very much.

1 THE COURT: Thank you, Mr. Patterson. And now,
2 we will recess for lunch. It's not quite ten minutes of one.
3 Let's recess until quarter of one. It's almost -- that's
4 almost a full hour. Be sure you leave your jury notebooks in
5 the jury room, and then bring them with you when you come back
6 into court. We're going to try to get started quarter of two.
7 And as far as the schedule is concerned, for typical days, and
8 today will now be a typical day, we'll recess day end about
9 quarter of five and we'll have a midafternoon break. I'll
10 have more to say about our schedule at the end of the day, but
11 for today, midafternoon break, recess 4:45.

12 And now Michael.

13 DEPUTY CLERK: All rise.

14 THE COURT: I'm sorry, we're minus a court
15 officer. Someone has to help the jury. You may now leave the
16 courtroom.

17 - - -

18 (The jury leaves the courtroom.)

19 - - -

20 THE COURT: See you after lunch.

21 Be seated everyone. Is there anything we have
22 to address before the government begins presenting its
23 witnesses?

24 MR. ECKERT: Not from the government, Your
25 Honor.

1 MR. PATTERSON: Not from Mr. Smith, Your Honor.

2 THE COURT: All right. Anything else? Ms.

3 Meehan. Mr. Wittels.

4 MR. WITTELS: Nothing, Judge.

5 THE COURT: All right. Then we'll --

6 MS. MEEHAN: Your Honor, I'm sorry. I would
7 just move for sequestration of all non-case agent witnesses at
8 the beginning of testimony.

9 MR. ECKERT: Certainly, Your Honor.

10 THE COURT: Are any of those witnesses in the
11 courtroom?

12 MR. ECKERT: I don't believe see, but I'll
13 check. No, Your Honor. We would likewise move for mutual
14 sequestration in the event the defense decides to call
15 witnesses.

16 THE COURT: Mr. Patterson, Mr. Wittels and Ms.
17 Meehan, the sequestration order will apply equally to the
18 defense --

19 MS. MEEHAN: Very well.

20 THE COURT: -- as to the government. And I
21 should add for the benefit of any people in court who wonder
22 what that means, typically, in Federal Court, a within is
23 sequestered, that is the witness is not allowed in the
24 courtroom until after the witness testifies. That's a general
25 rule. The exception to that rule is for case agents for the

1 government. I don't believe there are any exceptions in the
2 rules themselves for the defense. Of course, the defendants
3 are in the courtroom, but no other representatives of the
4 defendants.

5 On that note, we're in recess until quarter of
6 two.

7 MR. ECKERT: Thank you, Your Honor.

8 DEPUTY CLERK: All rise.

9 - - -

10 (Whereupon, there was a recess in the proceeding from
11 12:51 p.m. to 2:03 p.m.)

12 - - -

13 DEPUTY CLERK: All rise.

14 THE COURT: Be seated, everyone. Mr. Eckert,
15 you may proceed.

16 MR. ECKERT: Thank you, Your Honor. The
17 government will call Joel Ventura.

18 - - -

19 (PORFIRO JOEL VENTURA - SWORN)

20 - - -

21 (RAYMOND MCCONNIE INTERPRETER - SWORN)

22 - - -

23 (Testimony of Porfiro Joel Ventura taken under separate cover
24 from 2:06 p.m. to 4:39 p.m.)

25 - - -

1 THE COURT: Thank you. I think we'll defer the
2 Quinn cross-examination until tomorrow. It's not quite twenty
3 minutes of five and I don't want you to be watching the clock.
4 With that, I'll give you some brief day end instructions. I
5 gave you lengthy instructions before lunch, but there are two
6 that are particularly applicable now. You're going to go
7 home. It's your first day of testimony. You're going to be
8 asked, what did you do today, and you're going to have to say,
9 I sat on a jury, but I can't tell you anything about it.

10 If anything happens to be written in a newspaper
11 or broadcast on radio or television dealing with the case,
12 you're not to read it, listen to it or view it. And I've
13 explained why. You've got to decide this case based solely on
14 the evidence presented in the courtroom and not on what anyone
15 else writes about it or produces about it on radio or
16 television.

17 With that, have a safe trip home. We'll start
18 tomorrow, I think at 9:30. I think that works -- that should
19 work for everyone. If it does not work for anyone, I want to
20 know about it and we'll change the start time, but tomorrow,
21 we'll start at 9:30. And I'm looking for Ms. Hull. I want to
22 be sure that if I promise something it's delivered, but
23 tomorrow, I'm sure that there will be something for you to
24 snack on, coffee and donuts and things of that sort.

25 And so, Michael.

1 DEPUTY CLERK: All rise.

2 - - -

3 (The jury leaves the courtroom.)

4 - - -

5 THE COURT: Have a safe trip home, and be sure
6 you leave your jury notebooks in the jury room. See you
7 tomorrow morning.

8 Be seated, everyone. And you may step down, Mr.
9 Ventura. Mr. McConnie, we'll see you tomorrow.

10 MR. MCCONNIE: Yes, Your Honor. Thank you.

11 THE COURT: Mr. Ventura, good night.

12 I have a very short conference. It should take
13 about 20 minutes, maybe a little bit longer. So we'll recess
14 until then. Then we'll start the charging conference.

15 Is there anything we have to discuss before?

16 MR. ECKERT: Not from the government, Your
17 Honor.

18 THE COURT: Mr. Patterson, anything else.

19 MR. PATTERSON: No. Your Honor, I think I'll
20 defer to Attorney Wittels.

21 MR. WITTELS: Nothing, Judge.

22 THE COURT: Ms. Meehan.

23 MS. MEEHAN: No, Your Honor.

24 THE COURT: What is the position of the defense
25 on the need for the defendants to remain during the charging

1 conference? I should explain that what we're going to do is
2 review the charge and hear whatever you have to say, comments,
3 objections and I will rule on them. We might not finish the
4 charging conference tonight. If so, we'll have to reschedule
5 it. We'll continue it, and I do that regularly. It's not
6 unusual. So I need a response from defense counsel.

7 MS. MEEHAN: Your Honor, may I have a moment to
8 consult with my client?

9 THE COURT: Yes.

10 - - -

11 Pause

12 - - -

13 THE COURT: You can also talk to co-counsel.

14 MS. MEEHAN: Right, Your Honor.

15 MR. PATTERSON: Mr. Smith does not need to be
16 here, Your Honor.

17 MR. WITTELS: Nor does Mr. Stevens.

18 MS. MEEHAN: The same with Mr. Quinn.

19 THE COURT: Fine. Again, for the three
20 defendants, we're going to discuss the charge and after I make
21 my rulings, the final rulings, I'll distribute a revised
22 charge. And the parties will have the right to object, really
23 up until the time I start giving it.

24 I have, what I refer to as a floating charging
25 conference. So as long as I can correct it, if you have a

1 valid objection, I want to hear it. What we do in the
2 charging conference is, we'll not preserve your right to
3 object to the charge. You must do that before I give the
4 charge. And after I give the charge, I'll ask you if there's
5 anything that I gave in my charge that you wish me to correct,
6 change or well, modify in any way. And I'll entertain the
7 comments that you have then, but the way to preserve an
8 objection to the charge is to make it after I give the charge.
9 We'll try to get you a charge that is objection free, but if
10 not, you'll have a right to object after I give the charge.

11 All right. I'm going to go off the bench.

12 We'll resume, five after or ten after five.

13 DEPUTY CLERK: All rise.

14 THE COURT: You may go about your business,
15 everyone.

16 - - -

17 (Whereupon, there was a recess in the proceeding from

18 4:45 p.m. to 5:30 p.m.)

19 - - -

20 THE COURT: Sorry it took me a little longer
21 than anticipated, but I want to finish that conference. Be
22 seated.

23 What we're going to do is go over the charge.
24 With regard to the general instructions, I'm concerned not so
25 much about what I've said, because I've used the Third Circuit

1 standard instructions. I'm concerned about the need for all
2 of the instructions. I know a number are unnecessary, and
3 we're going to try to shorten the charge. A shorter charge is
4 better than a long charge. It's easier to understand, less
5 chance for the jury to get it wrong, and all-in-all, it's
6 better.

7 So let's go down the general instructions. You
8 can look at the table of contents. Should we address the
9 interpreter issue first? I was going to do that last, but it
10 matters not, maybe we ought to -- well, maybe plans will have
11 to be made for witnesses, but I understand that Mr. McConnie
12 is not available tomorrow, beginning at 9:00. He has a
13 sentencing, before Judge Robreno. And although trials trump
14 sentencings, I think maybe we can withdrawal Ventura and put
15 him on the stand in the afternoon or late in the morning.

16 Am I springing something on you? I thought you
17 discussed it.

18 MR. ECKERT: No, Your Honor. No, we're aware.
19 We've been discussing that potential way to solve that issue.

20 MS. MEEHAN: Your Honor, I think that case is my
21 office's case and I don't want to presume to think for Judge
22 Robreno or anyone, but I don't believe from my colleague that
23 there are contested issues in the sentencing. So we're hoping
24 that as soon as Mr. McConnie is through interpreting in Judge
25 Robreno's courtroom, he could be here between 9:30 and 10:00.

1 THE COURT: I doubt it.

2 MS. MEEHAN: Oh, okay.

3 THE COURT: Well, it's not that I know what Mr.
4 McConnie is going to be doing, but I know Judge Robreno, and I
5 don't think that sentencing will be finished by 9:30. And I
6 want to start as close to 9:30 as we can. Is there another
7 witness the government can put on?

8 MR. ECKERT: We're happy to put on witnesses if
9 it please the Court and counsel. We can make use of that
10 time, absolutely, with shorter witnesses.

11 THE COURT: All right. That's what we'll do.
12 Does anyone have to notify either your office, Ms. Meehan or
13 Judge Robreno?

14 MS. MEEHAN: About?

15 THE COURT: Well, has he been told there's a
16 conflict and that we're --

17 MS. MEEHAN: No. No. No. Your Honor, we were
18 just discussing how long we thought the sentencing -- we were
19 discussing order of witnesses, and if we could resume with Mr.
20 Ventura, because he was sort of the in the middle or towards
21 the end of cross-examination, and I thought based on what my
22 colleague had told me that it wasn't going to be a lengthy --
23 there aren't guideline objections and so forth. But that's
24 fine. We can start at 9:30 with a different witness.

25 THE COURT: That's what I'd like to do. So no

1 one has to notify anyone else. McConnie was instructed to be
2 here when?

3 MR. ECKERT: He just -- you and I -- or him --
4 I'm sorry, Your Honor. Mr. McConnie and I had a conversation
5 where he said he would be here as soon as he could after the
6 proceeding.

7 THE COURT: All right. Then we'll leave it that
8 way.

9 MR. ECKERT: Thank you.

10 THE COURT: All right. Let's go down the list
11 and see what we can cut out. The role of the jury, it's in
12 presumption of innocence, number two. Do you ever the table
13 of contents in front of you?

14 MR. ECKERT: I do, Your Honor.

15 THE COURT: Evidence, yes, in, direct and
16 circumstantial. Evidence, four, five, credibility of
17 witnesses. Six, is it necessary? Not all evidence, not all
18 witnesses needed. It's a short instruction, but it was
19 requested by the government. Is it necessary, Mr. Eckert?

20 MR. ECKERT: We believe it is, Your Honor.

21 THE COURT: Seven, audio visual recordings,
22 consensual. To what recordings are you referring? Not to the
23 one we just seen? That was a store recording. The government
24 isn't referring to that, is it?

25 MR. ECKERT: No, Your Honor. It would be -- I

1 think it would be the pole camera, but -- oh, no, I'm sorry,
2 no, these recordings were made with the consent and agreement
3 of the store owners, exactly. One of the parties to the video
4 recording.

5 THE COURT: All right. So you want us to leave
6 it in and insert the name of the store owner?

7 MR. ECKERT: It also -- we do, Your Honor. It
8 also applies to the 911 call, which we haven't heard yet, but
9 if that were to come into evidence, I think that would also be
10 applicable.

11 THE COURT: Well, it's very short charge. So
12 we'll add the -- well, do we have to identify, by name, the
13 agreement of one of the parties or can we just say, with the
14 consent and agreement without identifying by name?

15 MR. ECKERT: I think that's fine, Your Honor.

16 THE COURT: Of one of the parties. Can we do it
17 that way?

18 MR. ECKERT: I would agree with that. Yes.
19 Counsel, are you in agreement?

20 MR. PATTERSON: That's fine, Your Honor.

21 THE COURT: Mr. Wittels.

22 MR. WITTELS: That's fine.

23 THE COURT: Ms. Meehan.

24 MS. MEEHAN: Yes, Your Honor. I apologize. Can
25 we go back to the 911 call, the audio visual instruction? I

1 didn't know that the government was planning on introducing
2 the 911 call.

3 THE COURT: That's where -- we don't have to go
4 back, we're there.

5 MS. MEEHAN: Well, I guess the introduction of
6 the 911 call. I was unaware of that. And that would be --
7 I'm not sure what the relevance is of the call itself and what
8 the caller is saying. I'm assuming that they're trying to
9 introduce Ms. Rodriguez's call to Philadelphia Police and
10 she's making observations on her phone of a video. She's not
11 in the store. So her observations on her phone and the
12 description are irrelevant.

13 Mr. Ventura was in the store, he's the -- the
14 jury saw the video, saw Mr. Ventura, heard from him, heard his
15 impressions of what was going on. He was in the store as it
16 was happening in real-time, so it seems to me that's very
17 prejudicial, it's hearsay.

18 THE COURT: Hearsay. She's watching it on the
19 store video. She's not in the store, but she --

20 MS. MEEHAN: Well, there's also the response of
21 the call center. So I just would --

22 THE COURT: I haven't seen any of that evidence.
23 And I think what you should do is address this issue with the
24 government --

25 MS. MEEHAN: We will.

1 THE COURT: This is a little bit like, not
2 quite, a little bit like, I'd like to cross-examine the
3 witness on his immigration status, but the time is about the
4 same, but the bottom line, I want to get through the charging
5 conference.

6 MS. MEEHAN: Very well.

7 THE COURT: We're talking about the charge for
8 any admissible evidence and we've been told the charge is
9 necessary, because at the very least the video comes in.

10 MS. MEEHAN: And I don't dispute that, Your
11 Honor.

12 THE COURT: So what you're doing, you're telling
13 me that you're going to object to the telephone call, the 911
14 call.

15 MS. MEEHAN: Yes.

16 THE COURT: Discuss it with Mr. Eckert and be
17 prepared to argue it during a break, but not during the
18 charging conference.

19 MS. MEEHAN: Certainly. Thank you, Your Honor.

20 THE COURT: And now, let me finish writing. I'm
21 just going to put with the consent and agreement. And we
22 won't name of one of the parties to the video recording, but
23 you're talking about more than a video recording.

24 MR. ECKERT: Yes, Your Honor. It would be
25 potentially a video recording and the audio recording, pending

1 litigation of the 911 calls.

2 THE COURT: Did you propose a separate charge on
3 audio recordings? No.

4 MR. ECKERT: We did not, Your Honor. It
5 would -- we -- would be just one word we would add to the
6 video, or two words, video and audio recording.

7 THE COURT: Right now it reads, audio visual.
8 How do you want to head it up?

9 MR. ECKERT: I think the heading would be fine,
10 Your Honor. The end of the second sentence, I think we could
11 edit to the audio and the video recording.

12 THE COURT: All right. And we'll take it out.
13 And we'll note, Ms. Meehan, that you're probably going to
14 object to the audio recording.

15 MS. MEEHAN: Thank you, Your Honor.

16 THE COURT: Opinion evidence of expert
17 witnesses. Do you plan any?

18 MR. ECKERT: We'll have a firearms expert, Your
19 Honor, as well as an ATF Nexus expert.

20 THE COURT: I don't know that it's necessary to
21 identify the experts. Do you disagree? Identifying them by
22 name?

23 MR. ECKERT: No, Your Honor. I will be
24 certainly be tendering those experts, but in the instruction,
25 no, we don't need to do that.

1 THE COURT: All right. We'll just note, no need
2 to I.D. by name. Chain of custody. Is there a chain of
3 custody issue?

4 MR. ECKERT: [Indiscernible] but Mr.
5 Patterson --

6 THE COURT: I'm looking, it was Patterson and --
7 it was you too -- Stevens is objecting to chain of custody.
8 All right.

9 MR. PATTERSON: I'm not -- I was requesting
10 chain of custody. When the police recovered the store gun
11 from my client's car, the chain of custody then would be
12 bagged and tagged, went to the lab for the functionality
13 report, so I might have a few questions on that, not many.

14 THE COURT: All right. We'll leave it in. And
15 Mr. Wittels, are you planning on addressing chain of custody
16 at all?

17 MR. WITTELS: No, Judge. In light of the
18 agreements between counsel, and I don't think this --

19 THE COURT: Well, it's a short charge and --

20 MR. WITTELS: Yeah. No longer needed.

21 THE COURT: Well, but Mr. Patterson, do you want
22 that charge?

23 MR. PATTERSON: I do, Your Honor.

24 THE COURT: All right. We'll leave it in.
25 Specific investigation techniques not required. Mr. Eckert.

1 MR. ECKERT: Your Honor, I believe there's going
2 to be some effective cross-examination, if you will, about the
3 surveillance video that was recovered, so I believe that this
4 is an appropriate charge, and we would request it on that
5 basis. I guess I should rephrase that to some of the lack of
6 video that was recovered.

7 THE COURT: Well, the Third Circuit charge, the
8 model charge, makes mention of the claimed omitted techniques
9 that were addressed in either testimony or argument. What are
10 the omitted techniques?

11 MR. ECKERT: I expect that it's going to be
12 that --

13 THE COURT: It won't be you arguing.

14 MR. ECKERT: No. Right.

15 THE COURT: So why don't we hear from --

16 MR. ECKERT: That's fair. Thank you, Your
17 Honor.

18 THE COURT: -- you, Mr. Patterson.

19 MR. PATTERSON: If I --

20 THE COURT: You first.

21 MR. PATTERSON: If I got this charge right, it
22 would be -- I think that the argument is on point. That's --
23 there was no capture of the outdoor cameras at the store, even
24 though I believe it was a 16-camera system, which I can elicit
25 through the Philadelphia Police Officers, why there's no

1 capture of what happened outside the store.

2 THE COURT: Capture of outdoor cameras at store.

3 MR. PATTERSON: Right. I'm pretty sure they
4 were there, they just weren't -- there's no video -- no video
5 captured to present to the jury.

6 THE COURT: Are there any others, Mr. Wittels?

7 MR. WITTELS: Judge, I'm not sure if they
8 captured all the cameras inside the store. There are at least
9 a dozen of them, and we haven't seen all of those.

10 THE COURT: How long would we be here, were we
11 to see all of those?

12 MR. WITTELS: Yeah. I don't know what the
13 government's position is.

14 THE COURT: About as long as it took him to
15 testify as to the date when he first arrived in this country.
16 I was hanging on every word. We're going to try to speed this
17 up a little bit. Capture of outdoor cameras at the store,
18 what else? I'm hearing nothing.

19 MR. PATTERSON: No. That would be my only issue
20 with respect to that, there's people coming in and out of the
21 store all the time when this is going on, but there's no
22 capture of what happens outside the store.

23 THE COURT: Do you want me to include in this
24 instruction, failure to capture all of the outdoor, is it
25 capture the cameras or is it -- what phrase?

1 MR. ECKERT: Recover the surveillance footage.

2 MR. PATTERSON: That will be fine.

3 MS. MEEHAN: Well, no. We would -- Your Honor,
4 the government wants the specific investigation techniques not
5 required. Our argument would be that there's a lack of
6 evidence and the jury can consider the lack of evidence.

7 THE COURT: No, but this charge, it's charge
8 10 --

9 MS. MEEHAN: Oh, you -- you're giving the charge
10 and you want to know specifically what to reference. I see.

11 THE COURT: Yeah. That's --

12 MS. MEEHAN: Okay.

13 THE COURT: -- what we're doing tonight.

14 MS. MEEHAN: Yeah. There may be something else,
15 I can't predict that right now with other witnesses, but I
16 would agree with Mr. Patterson that store camera footage that
17 was not obtained by the Philadelphia Police or provided to the
18 Philadelphia Police after the incident.

19 THE COURT: Capture of all video footage. Well,
20 video suggests all -- let's do that again. Patterson, you had
21 it, I think the best.

22 MR. PATTERSON: Not that I forgot what I said.

23 THE COURT: Well, it's the defense who are
24 arguing. The government doesn't have to say.

25 MR. PATTERSON: That sounds good. Did I say

1 that?

2 MR. ECKERT: I said that.

3 MR. PATTERSON: Okay. Recovery of surveillance
4 footage.

5 THE COURT: Recovery of all surveillance camera
6 footage at store. Does that do it?

7 MR. ECKERT: It's fine with the government, Your
8 Honor.

9 MR. PATTERSON: It is, because I'll be arguing
10 in my closing the outdoor footage was not recovered.

11 THE COURT: Okay. Eye witness identification of
12 defendants. That's a long charge.

13 MR. PATTERSON: I've never made identification
14 of my client at the scene an issue.

15 THE COURT: Well, let's see who requested this.

16 MR. PATTERSON: I did.

17 THE COURT: And so did you Mr. Wittels, and so
18 did the government. Do you want me to give this charge?

19 MR. WITTELS: I see no need for it, Judge, in
20 light of the fact that we've stipulated the identities of the
21 defendants through this -- and with this witness. It's not a
22 question in the case any longer.

23 MR. PATTERSON: Maybe it can all be resolve, by
24 just the stipulation read to the jury that there's been --
25 that the defendants agree that they were on the scene when

1 this happened. I don't think you have to read that charge
2 since it's not an issue that was brought up during the trial,
3 Your Honor. That's just my opinion.

4 THE COURT: Does that satisfy the government?

5 MR. ECKERT: As long as this means the agreement
6 with that and they're willing to stipulate that there's
7 [indiscernible] that the three gentleman charged were the ones
8 in the video or the ones at the scene, then no, I don't think
9 that's necessary, Your Honor.

10 MR. PATTERSON: Right, but what I -- I just
11 would add that I think that if we're going to get rid of those
12 charges there would need to be a stipulation that's read to
13 the jury and mention in the stipulation charge.

14 MR. ECKERT: I would have no objection, Your
15 Honor to that.

16 THE COURT: Well, agree on a stipulation, we'll
17 remove this charge. We won't trash it forever, but it seems
18 to me that there was a stipulation. We started identifying
19 the defendants as they appeared in the video by name --

20 MR. PATTERSON: Correct.

21 THE COURT: -- by agreement, each of you, each
22 of the lawyers stood up and said, let's do it that way, so
23 it's done, the jury gets that impression, but a written
24 stipulation is certainly not inappropriate.

25 MR. ECKERT: Okay.

1 THE COURT: Let's get one by sometime tomorrow.
2 I'm going to make a note, delete subject to stipulation, as to
3 identity. All right. And we will add a very short -- take
4 out three pages and add just two or three lines on
5 stipulations. The only stipulation in the case now is in the
6 bifurcated trial part count three. Okay.

7 Next twelve, credibility of witnesses, law
8 enforcement officers. I think that has to remain. Three,
9 impeachment, bad character. It was requested by Smith and
10 Stevens. I have a question whether that's appropriate. You
11 first Mr. Patterson.

12 MR. PATTERSON: Your Honor, before I address
13 that impeachment of 422, impeachment within prior inconsistent
14 statement.

15 THE COURT: Where is that?

16 MR. PATTERSON: That's on my request, that's
17 right above where we are right now with the bad character. I
18 would request that charge.

19 THE COURT: Wait a minute. I don't think I've
20 skipped anything. Unless I did it inadvertently.

21 MR. PATTERSON: I believe that's 422.

22 THE COURT: No. Look at the table of contents.

23 MR. PATTERSON: Oh, I'm sorry, Your Honor.

24 THE COURT: We're going -- we're using my
25 charge.

1 MR. PATTERSON: I'm sorry, Judge. Okay. The
2 bad character, I don't believe there will be any testimony or
3 at least there has been to this point with respect to that.

4 MR. WITTELS: I agree, Judge. At that point, we
5 didn't know if our clients would be testifying or not, so does
6 not look like they're going to do that.

7 THE COURT: Ms. Meehan, it's going out.

8 MR. PATTERSON: Okay.

9 THE COURT: It can always go back in, it's not
10 out, out forever.

11 MS. MEEHAN: Thank you.

12 THE COURT: And the next one is prior bad acts
13 608b. Is that in?

14 MR. PATTERSON: I don't believe there's been a
15 notice for prior bad acts. There's been no notice, Your
16 Honor, so I don't think we need that.

17 THE COURT: No. They didn't ask for it, you
18 did.

19 MR. PATTERSON: I know.

20 THE COURT: And Stevens did.

21 MR. PATTERSON: So I would withdrawal that on my
22 behalf, on behalf of my client, rather.

23 MR. WITTELS: As would I.

24 THE COURT: Okay. And again, if something
25 happens, it's unexpected, we can always reverse. Prior

1 convictions, I haven't ruled on that -- those -- well, there
2 was one motion. It was filed by Ms. Meehan and no. No. The
3 government, I'm sorry, it was the government and Ms. Meehan
4 responded. Am I going to have to rule on that?

5 MS. MEEHAN: Your Honor, well, today, as of a
6 couple hours ago, no. That's sort of a fluid -- I think, I'm
7 pretty comfortable indicating he won't be testifying, but I
8 would alert the Court, if he's pretty insistent, I will alert
9 Your Honor.

10 THE COURT: Well, all right. I'm prepared, I've
11 read your submission about the government's motions and your
12 response, and I'm not unfamiliar with the law, and so that
13 won't come as the kind of surprise last night's motion in
14 limine arrived with.

15 MS. MEEHAN: Very well.

16 THE COURT: So we'll take this out.

17 MS. MEEHAN: Thank you, Your Honor.

18 THE COURT: Again, if there's a change, you'll
19 get back to me.

20 MS. MEEHAN: Certainly, Your Honor.

21 THE COURT: False in one, false in all. I guess
22 we have to leave that in.

23 MR. PATTERSON: Please, Your Honor.

24 THE COURT: Defendant's choice not to testify
25 and to testify, Paragraphs 18 and 19, one of them will go out.

1 Next, 404b evidence. Well, I guess it depends on whether the
2 evidence on the prior convictions comes in, but I suspect that
3 will come out. I'm talking about the 404b charge which was
4 requested by the government.

5 MR. ECKERT: We have not provided any 404b
6 notice, we're not presenting any 404b evidence, Your Honor.

7 THE COURT: Well, you did request a point for a
8 charge.

9 MR. ECKERT: We did, and I --

10 THE COURT: But that was at a time where you
11 weren't -- you had no final plans on how you would proceed.

12 MR. ECKERT: Exactly.

13 THE COURT: Okay.

14 MR. ECKERT: Exactly. Thank you.

15 THE COURT: Well, this will go out.
16 Consciousness of guilt, flight from the police. I suspect
17 that's applicable in the Smith case.

18 MR. PATTERSON: It is, Your Honor, and I brought
19 it up in my opening, so I have no objection, obviously --

20 THE COURT: No. I think it has to stay in. And
21 it's -- it individuates Smith which is appropriate. Now, if
22 there are any objection Tuesday anything that is going to
23 remain, I want to hear from you, but these are all Third
24 Circuit model instruction, so I suspect they're okay, and
25 again, if you look at this charge tomorrow or Thursday and

1 say, oops, I should've objected, it's not too late to object
2 at that time, so we'll do it that way.

3 Now, I'm on number -- Paragraph 21, prior
4 statement of non-testifying defendant, in multi-defendant
5 trial. That's a Bruton [ph]. Let me see who requested it.
6 You did Ms. Meehan.

7 MR. PATTERSON: I also did, Your Honor.

8 MS. MEEHAN: I did?

9 THE COURT: No. I don't think you did.

10 MS. MEEHAN: No?

11 THE COURT: But Mr. Wittels did.

12 MR. PATTERSON: I don't think we need it.

13 MR. WITTELS: Judge --

14 THE COURT: It's entitled, prior statement of
15 non-testifying defendant in multi-defendant trial.

16 MR. WITTELS: Yeah. That's no longer necessary.
17 We've established that there are no such statements.

18 MS. MARTIN: Your Honor, I do think it's
19 necessary. There's the second 911 call that we're talking
20 about.

21 THE COURT: I'm sorry, the --

22 MS. MARTIN: There's a 911 call that we believe
23 was placed by defendant, Donnie Smith that we intend to play.

24 THE COURT: And what about that call?

25 MS. MARTIN: Well, that would be a prior

1 statement. It's not really a Bruton issue in any way, shape,
2 or form, but it should probably be only considered against
3 him.

4 THE COURT: This has been shared in discovery,
5 of course?

6 MS. MARTIN: Of course.

7 THE COURT: Do you know what it is, Mr.
8 Patterson?

9 MR. PATTERSON: I'm thinking, Judge, and I
10 don't.

11 MS. MARTIN: Your Honor, there's a 911 call
12 about 50 minutes after the incident where an individual calls
13 and says His Maroon Ford Taurus with New Jersey temp tags was
14 just taken by an assailant. It's an individual that describes
15 the vehicle that crashed at the site. He says he's up at
16 Broad and Chew which is a block away or somewhere near where
17 the robbery happened about a block away. Said he was in the
18 store, so that would be Donnie Smith saying he was in the
19 store when the commotion happened. He didn't know what was
20 going on and someone stole his car. So he's providing an
21 alibi for himself about 50 minutes after the incident.

22 MR. PATTERSON: I'm not saying I don't have
23 that, Judge, I'm just -- I just don't recall it.

24 THE COURT: All right. Then let's take a look
25 at that charge, Paragraph 21. We'll have to insert the name

1 of the Defendant Smith in Paragraphs 1 and 2. What about
2 Paragraph 3, it's bracketed?

3 MS. MARTIN: I don't see any need for that, Your
4 Honor.

5 THE COURT: Do you agree, Mr. Patterson?

6 MR. PATTERSON: I do, Your Honor.

7 THE COURT: Okay. Twenty-two, impeachment of
8 defendant. I suspect the defendants won't testify. We'll
9 take that out. If it has to go back in, then we'll do so.

10 Twenty-three, charges. I don't think there's a
11 problem with twenty-four. Tell me if there are any problems
12 as we go through these next charges. On or about is
13 twenty-four. Impeachment is twenty-three. Twenty-five,
14 separate consideration, multiple defendants charged with the
15 same offenses. I don't think there's an issue there. I think
16 we have to give it. And then we start with [indiscernible]
17 robbery. It's Paragraph 27. I think twenty-seven is okay,
18 you've all request ed -- you all requested it.

19 Paragraph -- no, I'm looking at tabs, but the
20 tabs, do they coincide? I guess they do. Twenty-seven, Hobbs
21 Act Element 2, robbery defined. Any issue there? Hearing
22 nothing, next, why put Element 2 ahead of -- why Element 2
23 before Element 1?

24 LAW CLERK: That's exactly [indiscernible] the
25 instructions were ordered [indiscernible].

1 THE COURT: Well, that's a strong argument for
2 including it that way. Does anyone -- someone is on their
3 feet.

4 MS. MEEHAN: Yes, I am. Sorry. Your Honor, I
5 know I'm on thin ice with last minute objections. I was
6 thinking about this, because of -- and I think it's confusing
7 to us as attorneys, I think it will be crazy confusing to the
8 jurors. And I'm wondering if the Court would consider -- I
9 think the government's theory of liability as to the
10 defendants Stevens and Smith for Hobbs Act Robbery is through
11 [indiscernible] liability, and they can correct me if I'm
12 wrong, and Mr. Quinn is the principle. So I'm wondering if
13 the Court could -- if we could instruct, I don't know --

14 MR. ECKERT: Oh, no. I was -- that's certainly
15 a theory of liability, but it's not our own theory of
16 liability. We do believe that there's certainly enough
17 evidence to go to the jury on -- as Mr. Smith and Mr. Stevens
18 as principles, that's not, of course, what we're arguing, what
19 Ms. Meehan suggests, but it's on both.

20 MS. MEEHAN: So I just -- I still think it's
21 confusing to lump them together. First Donnie Smith, Abid
22 Stevens and Maurice Quinn took from the employees of RD
23 Grocery the property described.

24 THE COURT: That's what the indictment charges.

25 MS. MEEHAN: Very well.

1 THE COURT: I'm not -- I don't want to quash any
2 advance thinking, and there's no -- we're not locked into
3 anything, but this is the way the case was presented to me by
4 all of you, and that's why I've said what I said to the jury,
5 but of course, we can undo that by instructions at the end of
6 the trial, they'll be governed by the trial evidence. But
7 what we've done, we've taken the Hobbs Act charge from the
8 Third Circuit model instructions and it starts with Element 2,
9 taking or obtaining a personal property from the person or in
10 the presence of another against his will by means of actual or
11 threatened force. It's nothing new.

12 And Count 1 is, unlawful taking by force by
13 unserved [ph] fear, and it's defined. I want to know whether
14 there's any objection to those charges, Count 1, the first
15 element and the second element. And then the interstate
16 commerce element, any objection?

17 MS. MEEHAN: No, Your Honor.

18 MR. ECKERT: No, Your Honor.

19 MR. WITTELS: No, sir.

20 THE COURT: All right. Now, we get into
21 accomplice liability, which I think is complicating. Not as
22 complicating as Pinkerton liability, and if you think I was
23 difficult this morning, I'm liable to be even more difficult
24 at seven minutes after six. Tell me why we need accomplice
25 liability. I suspect I know the answer, but I want to hear

1 it.

2 MR. ECKERT: Certainly, Your Honor. It's one of
3 our theories of the case is that Mr. Smith and Mr. Stevens
4 were aiding their friend or their buddy in getting his goal
5 which was to take the property of an institution. They
6 facilitated the crime by -- they were the ones with the
7 weapons, so they were the ones that controlled the -- both the
8 store employee as well as the clerk. And that but for their
9 actions is why that the robbery was able to be successful. So
10 they were accessories before the fact.

11 THE COURT: And it was Quinn who ended up with
12 \$100 and the gun.

13 MR. ECKERT: Well, he ends up with -- he is --
14 ends up with the gun, so he's the pecuniary beneficiary. Mr.
15 Smith, we would also argue is both an accomplice -- an
16 accomplice to the robbery of the money, but he actually takes
17 the gun, so he's liable under a principle theory of liability,
18 absolutely.

19 THE COURT: Well then, we need this charge, and
20 does -- I don't like the -- it doesn't work. I didn't go back
21 and read this, that another person that's different than the
22 way it was phrased in my preliminary jury instructions, it
23 doesn't make sense that another person or one of them, so
24 we'll have to change that.

25 Do you have -- I have a copy of that. Let me

1 tell you how I think we should change that. There was no
2 objection to the way we fine-tuned this -- well, these
3 elements, the aiding and abetting elements for Counts 1 and 2.

4 What we have in the statement of the case, and I
5 think in the preliminary jury instructions is this, that
6 Donnie Smith, Stevens and Quinn took from employee of RD
7 Grocery the property described in Count 1 of the indictment,
8 \$100 in United States currency, and a firearm, a Glock, with
9 eight live rounds.

10 Two, that Smith, Stevens and Quinn did so
11 knowingly and willfully by robbery. That's not the -- these
12 are not the elements for aiding and abetting. And there's no
13 issue there. The aiding and abetting charge reads -- these
14 are the elements. First, that the substantive crimes were
15 actually committed by another. That is, that someone
16 including one of the defendants obstructed, delayed and
17 affected interstate commerce. And we adopted that approach.
18 Is that agreeable?

19 MR. ECKERT: It is, Your Honor.

20 THE COURT: Because what we have in the -- in
21 this charge, it doesn't work. So we'll charge on accomplice
22 liability for Count 1, essentially, what is set forth, at
23 least as far as the elements are concerned, they will read,
24 first, second, third and fourth, they will read as they do in
25 the statement of the case.

1 Now, let's go to Page 2 of that charge. It's
2 numbered 41. Is there anything in that part of the charge
3 that's inapplicable?

4 MS. MEEHAN: Are you on Page 41, the Pinkerton
5 charge, Your Honor?

6 THE COURT: No, we're not there yet.

7 MS. MEEHAN: I apologize.

8 THE COURT: We're still --

9 MS. MEEHAN: I thought you -- I heard 41.

10 THE COURT: We're reading -- it's accomplice
11 liability. It's numbered 31.

12 MS. MEEHAN: Oh, 31.

13 THE COURT: And specifically, it's Page 2 of
14 that charge. The page number that I -- well, the page numbers
15 don't -- yes, they do, it's page 40.

16 MS. MEEHAN: Okay.

17 THE COURT: Page 40, it begins on page 40, and
18 we decided that the elements, first, second, third and fourth
19 will be changed to coincide with what is set forth in the
20 preliminary jury instructions. And now I'm on page 41. Is
21 there anything on that page that's inapplicable? We have to
22 make some choices of words. But first, we have to decide on
23 the language. And the sentence reads, if the evidence shows
24 that Donnie Smith, well, Smith, Stevens and Quinn knew that
25 the offense was being committed or was about to be committed,

1 but does not prove beyond a reasonable doubt that it was
2 Smith, Stevens and Quinn's intent and purpose. What word do
3 you think we should use, aid, assist, facilitate, encourage?
4 Government.

5 MR. ECKERT: I'm sorry, Your Honor. May I just
6 have one moment to confer? I think aid or assist is what
7 would be most applicable, Your Honor.

8 THE COURT: All right. Any objection to that?

9 MS. MEEHAN: No objection.

10 MR. PATTERSON: No, Your Honor.

11 MR. WITTELS: No, sir.

12 THE COURT: All right. And a little further
13 down, we're going to change the language, another person or
14 one of them to read as the statement of the case reads. And
15 the same, a little further down on the last paragraph, another
16 person or one of them, and on the last line, it will be aid or
17 assist. And the last page, Page 42 of this charge, aid or
18 assist. About this time I'm going to be very hoarse. This is
19 a pretty heavy charge.

20 All right. Anything else that we have to
21 discuss with respect to aiding and abetting? Now, Mr. Eckert.

22 MR. ECKERT: Yes, Your Honor.

23 THE COURT: See, Ms. Martin gets away with not
24 having to argue any of these issues. She's got --

25 MR. ECKERT: I'm happy.

1 THE COURT: She's got the fun part of the trial,
2 the closing.

3 MR. ECKERT: I'm happy to turn over this
4 argument to her, but I'll [indiscernible] I'll be fair and
5 swift.

6 THE COURT: Are you serious about going ahead
7 with Pinkerton liability?

8 MR. ECKERT: After the Court's discussion last
9 night, I did run this by my supervisor, and he directed me --
10 told me that we should seek a Pinkerton charge, because I
11 think a conspiracy can be made out on these facts, Your Honor.
12 And I apologize for any inconvenience that cause to the Court
13 or counsel, but that's --

14 THE COURT: Well, it's not an inconvenience. It
15 really, in my judgment, it adds an issue, a significant issue.

16 MR. ECKERT: Right.

17 THE COURT: A big chunk of the case that wasn't
18 charged, but you don't have to charge Pinkerton liability, but
19 in my experience, at least I remember one case where I
20 succeeded in convincing the AUSA that it was unnecessary and
21 unduly complicated the case, and I'm telling the story,
22 because he deleted the Pinkerton liability and there was a
23 conviction.

24 MR. ECKERT: Right. And I -- I think it's
25 applicable for the simple fact that this is a bit of a -- I

1 don't mean to give fodder to the defense, as they've
2 excellently presented their cases, but this is a bit of a
3 unique case. And given that the amount here is \$100, the
4 Pinkerton liability is rather -- in our view, it's persuasive
5 for what this case entails, which is that there's an
6 agreement, one is formed in a few seconds outside. They then
7 go back into the store, we believe it to be -- it's certainly
8 a theory of liability that the jury could find under these
9 facts.

10 THE COURT: Have the defendants carefully read
11 the Pinkerton charge?

12 MS. MEEHAN: Well, not as carefully as I
13 probably should've, Your Honor. But we strenuously object.
14 There -- I -- we agree with the Court's assertion that the
15 Pinkerton charge can be given without having a conspiracy
16 count in the indictment. However, there's still has to be
17 some evidence of conspiracy in order for the Court to give the
18 Pinkerton charge.

19 In this case, and I do agree with Mr. Eckert, it
20 is a unique case, but there's no evidence and I think the
21 Court can hold off on making a determination this evening, but
22 I don't think you'll see anymore evidence that these
23 defendants had some agreement or some indication that they had
24 some uniform plan, so that's why the aiding and abetting
25 theory is appropriate and I think it will be completely

1 confusing for the jury to have the aiding and abetting
2 instruction which seems to be less of a burden. There's no --
3 for meeting and a pre-conceived plan, and then get a Pinkerton
4 charge that discusses the conspiracy, and they'll be
5 scratching their heads say, what -- where's the conspiracy,
6 and none of us have addressed conspiracy. Certainly, not in
7 opening, and I would --

8 THE COURT: Well, you can certainly address it
9 if it's in the case. I think the argument is that when Quinn
10 left the store and came back with Smith --

11 MS. MEEHAN: I object to Your Honor's
12 characterization of coming back [indiscernible].

13 THE COURT: Well, he came back to the store. He
14 left.

15 MS. MEEHAN: He did come back.

16 THE COURT: Said, I'll be back, and he was back
17 with Smith and Stevens.

18 MS. MEEHAN: Well, that is the essential
19 question.

20 THE COURT: Although, I don't want to argue the
21 government's case, because I really, I really think my goal is
22 to make jury instructions understandable. The library said, I
23 was the only judge who ever read that book, and so they gave
24 it to me. It's in chambers. And having charges like this,
25 first of all, I have trouble with the conspiracy charge. I've

1 used the Sand charge, I've used the Debit [ph] charge, I've
2 used all the conspiracy charges. I discussed the conspiracy
3 charge with Leonard Sand, who wrote the charge book. He has
4 since passed away. He was a District Judge at SDNY, and he
5 said, you know I don't like it either. If you can write a
6 better conspiracy charge, send it to me, if I like it, it's in
7 the book, and you'll get credit for it. Well, I tried. I
8 did. I didn't succeed. So my fallback position is unless
9 conspiracy is really in the case, let's try to keep it out.
10 But the government has a point. I think you're right. I only
11 charge on issues that are raised by the evidence. And I'll
12 hear Mr. Eckert. I don't want to tap him out now, I want him
13 to -- if you think the evidence is going to tilt us in the
14 opposite direction, away from Pinkerton, we'll wait until we
15 hear it. Well, Ms. Martin, apparently, has some other ideas.

16 MS. MARTIN: No, Your Honor, I would just ask
17 that you reserve ruling. I think that there will be more
18 evidence of a conspiracy when you see a little bit more of the
19 video, and the way certain things line up in the case. I
20 think that there will be more evidence of what happened
21 outside of the store.

22 THE COURT: All right. Well, I'm not going to
23 rule, definitely. I've told you that with respect to all
24 rulings on the charge, what I do is, we construct the charge
25 as we go. My goal is to have a charge as to which everyone

1 agrees. I very rarely have objections to my charges. And
2 I've given lots of charges. In this case we'll leave
3 Pinkerton in for now, but I direct the four of you to read
4 that charge, and the conspiracy charge, and be prepared, we'll
5 have a Part 2. And what we'll do at Part 2 of the charging
6 conference is see if there's anything that is inapplicable in
7 the Pinkerton charge and the conspiracy charge. And perhaps
8 pare it down.

9 I think on the notice that I gave you and the
10 fact that you're scurrying about trying to get witnesses
11 ready. This is not the appropriate time to do that. So I'll
12 come back to Pinkerton, which is, it's Tab 32, and then the
13 conspiracy charge, 33, 34, 35. And 35 is the key that you
14 raised Ms. Meehan. The second element in the conspiracy
15 charge, membership and the agreement, the agreement itself.
16 And we'll see.

17 Perhaps, if we invite some supervisors,
18 including the boss, I said you're filing lots of object cases.
19 You can see how one really unfold, that's rather unusual. I'm
20 sure he's got nothing else to do than to sit on an object
21 case.

22 Mental states, how do we call -- I'm going to
23 call that charge before. I'm just getting advised while my
24 law clerk that the Third Circuit says, you should charge on
25 all of the model conspiracy charges, all of them. But in any

1 event, I want you to look at the Pinkerton charge. There's a
2 single charge, and the conspiracy charges. And we'll pick up
3 on that. The issue is, if the government won't withdrawal,
4 and I suspect Mr. Eckert is probably not going to withdrawal,
5 whether there's an argument for not including them and I
6 suspect -- well, I won't. I'll wait and see what happens.

7 MS. MEEHAN: Thank you, Your Honor.

8 THE COURT: But there are lots of points.
9 Paragraph 32 to 40, a big chunk of the charge, so we'll come
10 back to that. Next is Count 2, and we gave Paragraph 21, we
11 gave the model instruction. I'm on page -- on Paragraph 41.
12 Are there any issues with 41?

13 As I look at it, it looks appropriate. It's the
14 first instruction on Count 2, 42 is of the firearm defined.
15 We'll change the accomplice liability, but you need paragraph
16 43 to coincide with what we've done with respect to accomplice
17 liability in Count 1. Motive.

18 MS. MEEHAN: Your Honor, I object to the Court's
19 accomplice liability.

20 THE COURT: The accomplice -- the aiding and
21 abetting charge --

22 MS. MEEHAN: Yes.

23 THE COURT: -- with respect to Count 2?

24 MS. MEEHAN: Correct, Your Honor. I submitted
25 one instruction, and the reason is that through the majority

1 of the evidence, the model instructions are sufficient, but
2 there have been problems with the accomplice liability as it
3 pertains to aiding and abetting in 924c and I know the Court
4 is very familiar with the Supreme Court case of Rosemond,
5 R-O-S-E-M-O-N-D versus --

6 THE COURT: Yes. I have that.

7 MS. MEEHAN: -- the United States.

8 THE COURT: I'm looking at it.

9 MS. MEEHAN: So and I -- I want to call the
10 Court's attention, I've submitted one and I think that the
11 sequence is less confusing and very --

12 THE COURT: Well, you submitted the -- in
13 essence, the Sixth Circuit charge.

14 MS. MEEHAN: With modifications, that's correct,
15 Your Honor.

16 THE COURT: But the Third Circuit says, we've
17 taken into consideration Rosemond, and this is what we
18 recommend you do.

19 MS. MEEHAN: Right. However, the Court doesn't
20 have to do that, and I think in this particular case, given
21 the facts and we've ascertained this is a unique set of facts,
22 the -- one of the problems is the Court doesn't define advance
23 knowledge, and I think that the jury needs to have that
24 definition and that is part of the what I submitted in my jury
25 request in the middle of the page, advance knowledge means and

1 then there's a definition, knowledge beforehand -- Mr. Quinn
2 had a realistic opportunity to quit the crime after learning
3 that a firearm would be used and carried, and much of this
4 language mirrors the language that is in Rosemond. And in
5 fact, I'm troubled by what the government opened with. In
6 their opening argument, Mr. Eckert said, Mr. Quinn had
7 advanced knowledge, because "before he got the money, he knew
8 firearms had been displayed," so he was talking about conduct
9 that was in the store, and that -- it's not as if they were
10 all in there and the guns were already out and Mr. Quinn was
11 there and he went in with them and the guns were already
12 brandished or displayed. Quite the opposite. Mr. Quinn had
13 been in there. He went out. He came back in before the
14 either two, Mr. Smith came in, did not have a gun, and then
15 pulled a gun out, and this is on the video. This is the
16 sequence of events and then Mr. Stevens came in 10 seconds
17 later and pulled a gun out pretty quickly.

18 Now, Mr. Quinn had already been in there, in the
19 store for about 40 seconds, so the law does not say that if
20 Mr. -- the law is the opposite and I'm going to quote from the
21 Rosemond case here, Your Honor. Under these principles and
22 I'm on page 1251 of the cite 134 Supreme Court 1240, under
23 these principles, the District Court erred in instructing the
24 jury, because it did not explain that Rosemond needed advance
25 knowledge of a firearms presence. They were at a drug deal.

1 Recall that the Court stated that Rosemond was guilty of
2 aiding and abetting, "If he knew his cohort used a firearm in
3 the drug trafficking crime, and he knowingly and actively
4 participated in the drug trafficking crime."

5 So I think that is very similar to what Mr.
6 Eckert was arguing. That if Mr. Quinn, he saw the guns, he
7 knew the guns were there, therefore, he's guilty of aiding and
8 abetting, that is contrary to the Rosemond, Holden [ph].

9 THE COURT: Well, but the -- I'm looking at the
10 instruction on Paragraph 43, and I guess the answer to this
11 issue, at least from the perspective of the Third Circuit is
12 found on Page 59.

13 The element we're talking about is the third
14 element, that the defendants were active participants in the
15 using and carrying of a firearm during a crime of violence.
16 And the key language is, and also had advance knowledge that
17 one of the principles would use a firearm during and in
18 relation to the interference with interstate commerce by
19 robbery.

20 Now, in defining that in deciding whether
21 defendants had the required knowledge and intent to certify
22 the third requirement, you may consider both direct and
23 circumstantial evidence. However, evidence that defendants
24 merely associated with persons involved in the criminal
25 venture, and we'll have to change the -- this says, or was --

1 it should be were merely -- present or knowing spectator, not
2 enough. If evidence shows that defendants knew that the
3 offense was being committed or was about to be committed, but
4 does not also prove beyond a reasonable doubt that it was
5 defendant's intended purpose to aid and assist or otherwise
6 associate themselves with the offense.

7 It isn't as specific as -- and I'm not -- and I
8 haven't read the whole thing yet.

9 MS. MEEHAN: Your Honor, my position is the
10 advance knowledge requires the government have evidence and
11 proof before the guns are displayed. And the government
12 argued, I think in a sort of misleading way that Mr. Quinn
13 before he got the money, he knew firearms had been displayed
14 and that's not the language of the instruction is that one of
15 the principles would use a firearm, not after the fact that he
16 knew. That's the opposite of the Rosemond case. It's too
17 late at that point in time for Mr. Quinn, arguably, to
18 withdrawal. He's merely present in the store and someone
19 brandishes, pulls out a firearm and there's no -- and he
20 doesn't have advance knowledge. He's not guilty of aiding and
21 abetting.

22 So I think advance knowledge needs to be further
23 defined, especially in light of what the government argued.
24 And I realize it's not evidence, but I think it would be --
25 it's very confusing to the jury. They may think that it's

1 sufficient that because when they came in the store, they
2 pulled out guns and Mr. Quinn saw the guns that that's enough,
3 and it's most definitely under our Supreme Court law not
4 enough.

5 THE COURT: Well, the proposed instruction, I'm
6 reading from the Third Circuit notes, to find that a defendant
7 had advance knowledge that one of the principles would use or
8 carry a firearm during and in relation to the robbery, you
9 must find that the government prove defendant had knowledge of
10 the firearm at a time when he or she could do something with
11 that knowledge, such as walking away from the criminal
12 venture. Isn't that -- doesn't that meet your argument?

13 MS. MEEHAN: Well, I would -- I don't think Mr.
14 Quinn could walk away. I think --

15 THE COURT: Well, what you're saying is, in
16 order to convict Quinn under the aiding and abetting statute
17 for Count 2, as applied to Count 2, he's got to be able to
18 have that knowledge. He's got to have that knowledge at a
19 time when he can walk away.

20 Now, I don't see that in a draft charge, Ryan,
21 is that in there?

22 MR. ECKERT: [Indiscernible].

23 THE COURT: I'm looking at the Third Circuit
24 model -- I think it's answered. Now, I -- it's not exactly a
25 brief explanation, it's rather prolix, but we have said, as

1 the Third Circuit says, to find that defendants had advance
2 knowledge one of the principles would use or carry a firearm
3 during and in relation to -- well, the crime of robbery, you
4 must find that the government proved that they had knowledge
5 of the firearm at a time when they could do something with the
6 knowledge, such as walking away from the criminal venture.
7 You could lean on that language and if, as you say, the only
8 evidence or the first evidence that Quinn had that a gun would
9 be used was after he was back in the store a second time then
10 he could not have walked away or you can argue that he could
11 not have walked away. But I think I'm going to stick with the
12 Third Circuit charge. I'm going to read this again. I'm not
13 entirely --

14 MS. MEEHAN: Your Honor, I think the problem
15 with the Third Circuit charge is that it was written before
16 2014 and then Rosemond came out, and then they were sort of
17 slapping Band-Aids on to what was already a --

18 THE COURT: But I'm not in the Sixth Circuit,
19 I'm still here.

20 MS. MEEHAN: No. I -- no, the Third Circuit,
21 we --

22 THE COURT: And I see those guys all the time.

23 MS. MEEHAN: Well, I -- well, that's why there's
24 this advisory committee, Your Honor and they're tinkering with
25 the instructions and this is one of the instructions, because

1 of Rosemond that they were sort of --

2 THE COURT: Well, the argument that you've made,
3 I must say, I haven't read into this as thoroughly as you
4 apparently have, but I think the instruction that I flagged
5 meets the argument that you made and if the only evidence the
6 government has is evidence that Quinn should've realized a
7 weapon was being used, after he was back in the store the
8 second time, you can argue that he couldn't walk away.

9 MS. MEEHAN: With the exception of I would still
10 request the advance knowledge definition that I submitted be
11 included.

12 THE COURT: We'll consider it.

13 MS. MEEHAN: Very well, thank you.

14 THE COURT: I'm not ruling on it now.

15 MR. ECKERT: The only thing I just want to
16 offer, Your Honor, is that absolutely, I think this is a
17 matter that goes to the jury. We're going to argue that when
18 he's at the threshold of the store, and he walks to the other
19 end of the store, he had the opportunity to walk away. Ms.
20 Meehan's free to argue that he did not, and that conduct does
21 not meet the element, but I just think it's important.

22 THE COURT: Well, the question whether the
23 instruction on when he must have the knowledge that someone
24 else in the group was going to use a gun is vague, if she is
25 correct and I don't think she is, we'll take a look at it.

1 MR. ECKERT: Very well.

2 THE COURT: Is there anything you wish to add on
3 the point?

4 MR. ECKERT: Just that we would rely on the page
5 70, I believe it's page 76 of Rosemond which says, "For the
6 reasons just given, we think that that means advance knowledge
7 at a time that the accomplice can do something with it, most
8 notably, opt to walk away," as the Court's indicated.

9 THE COURT: Well, that's in the charge.

10 MR. ECKERT: No, I -- I'm just using that as
11 authority to support what the current charge is, that's my
12 only -- I want to --

13 THE COURT: Well, Mr. Eckert, you have, in
14 addition to Rosemond, you have the Third Circuit model
15 instructions. Their certainly consistent with them. All
16 right. We'll take a look at that. Next is --

17 MS. MEEHAN: And, Your Honor, I'm sorry, I know
18 that -- this is my case, that's why I -- this is central to my
19 case and I'm sorry to belabor this. I will look for language.
20 I'm pretty sure that the definition of advance -- there's
21 language in Rosemond that speaks to the last sentence of my
22 submission of advance knowledge. Mr. Quinn's continued
23 participation in a crime of violence once the firearm -- once
24 the firearm is used or displayed is not sufficient to find Mr.
25 Quinn guilty of using and carrying a firearm during and in

1 relation to a crime of violence. So it's a little more than
2 the didn't walk away.

3 THE COURT: I'm not sure I'm going to give that.
4 I think didn't walk away, the argument the government might
5 make is the appropriate language.

6 MS. MEEHAN: Well, Your Honor, it is in the case
7 and I can submit something or we can at the final charge
8 conference or when I state my objection, because that would
9 be -- if it's language from Rosemond that would be an accurate
10 statement of the law.

11 THE COURT: Except, it's not binding on it.

12 MS. MEEHAN: No.

13 THE COURT: And the Third Circuit really isn't
14 their model instructions, but they cover the issue, the same
15 issue in a slightly different way. And we're completely
16 consistent with the Third Circuit, but -- well, Ryan noted
17 that Rosemond was decided a few years ago, like six and the
18 Third Circuit charge is still being given, but we'll look at
19 that.

20 We're just about finished. Motive, necessary to
21 charge motive? The government requested it.

22 MR. ECKERT: We believe it is appropriate, Your
23 Honor.

24 THE COURT: Well, it might be appropriate, we
25 could charge a lot of things. Is it necessary?

1 MR. ECKERT: We believe so, Your Honor,
2 especially based on, again, the amount of money that was taken
3 in this case, I believe it's important to instruct the jury as
4 to what motive actually is, and whether it's required.

5 THE COURT: All right. We'll leave it in for
6 now. Deliberations, I don't think there's much there that can
7 be pared. Anything in Paragraph 42? I don't think so.
8 That's one we've used over and over again. Verdict perform
9 and special interrogatories though. Any issues with respect
10 to the verdict form?

11 MR. ECKERT: No, Your Honor.

12 MS. MEEHAN: I have an objection, Your Honor.

13 MR. PATTERSON: No, Your Honor.

14 THE COURT: Any issue with the way we handle the
15 question of brandishing? I think it's about time and in the
16 very last question, any issue with additional considerations
17 which really is Count 3? I'm not going to do Count 3 tonight.
18 It's very simple. You have it. And we can have a quick
19 charging conference.

20 MR. PATTERSON: I understand, Your Honor.

21 THE COURT: With respect to Count 3. Yeah, I'm
22 a little --

23 MS. MEEHAN: Your Honor, can I raise the verdict
24 form as to [indiscernible] at a later date if Your Honor --

25 THE COURT: What's the -- well, yeah. Why don't

1 we talk about it very briefly now? I want to shut down by
2 7:00, at the latest.

3 MS. MEEHAN: Oh, this is -- Your Honor --

4 THE COURT: Ryan --

5 MS. MEEHAN: My position is if the jury finds
6 Mr. Quinn not guilty of robbery on Count 1, because that is a
7 charged offense, robbery, then they can't move to the issue of
8 Count 2, 924c. Now, if it wasn't charged and there was
9 evidence of a robbery, they could still find the defendant --
10 the jury could find a defendant guilty of 924c, but if they
11 actually -- if it's charged, and they reach a verdict, then
12 they cannot move to Count 2 and that's why I had submitted a
13 verdict form with language saying if you reach a verdict of
14 not guilty or words to that affect, I don't have it in front
15 of me, Your Honor, that they -- that there's no need to move
16 to Count 2.

17 THE COURT: Mr. Eckert, it seems to me the
18 argument is that if any defendant is found not guilty of Count
19 1, he can't be found guilty of Count 2.

20 MR. ECKERT: I would like the opportunity to
21 discuss that with my office, Your Honor, before I take a
22 position on that. That's not completely -- that's the exact
23 way our verdict form is written, but just would ask for --

24 THE COURT: No, it isn't. And I'm -- but I'm
25 thinking, a Count 2 charge is using or carrying and I gratin

1 that the linking language, whether it's in --

2 MR. ECKERT: Right.

3 THE COURT: -- furtherance of or during --

4 MR. ECKERT: Right.

5 THE COURT: -- the robbery, charged in Count 1.

6 MR. ECKERT: If -- I just -- again, I would like
7 to ask the Court permission to address that tomorrow. I'm not
8 saying anyone's wrong. I just want to check on that before I
9 take a position.

10 THE COURT: Okay. Good. I think we're through.
11 Anything else, Mr. Eckert?

12 MR. ECKERT: No, Your Honor.

13 THE COURT: Ms. Martin.

14 MS. MARTIN: No, Your Honor. Thank you.

15 THE COURT: You're going to work on Mr. Eckert
16 with respect to --

17 MR. ECKERT: I'm a lost cause in many ways.

18 MS. MARTIN: I'll do my best.

19 THE COURT: With respect to Pinkerton?

20 MR. ECKERT: I believe I'm a lost cause, but
21 we'll do our best.

22 THE COURT: Mr. Patterson.

23 MR. PATTERSON: No, Your Honor. Thank you.

24 THE COURT: Mr. Wittels.

25 MR. WITTELS: No, Your Honor.

1 THE COURT: Ms. Meehan.

2 MS. MEEHAN: No, Your Honor. Thank you.

3 THE COURT: Okay. Thank you. All right. We're
4 in recess.

5 DEPUTY CLERK: All rise.

6 THE COURT: Tomorrow morning, what time did I
7 say? 9:30?

8 UNIDENTIFIED SPEAKER: 9:30.

9 UNKNOWN SPEAKER: Yeah.

10 - - -

11 (Whereupon, the proceeding was concluded
12 at 6:46 p.m.)

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C E R T I F I C A T E

I do hereby certify that the aforesaid hearing was transcribed by me from an audio recording to the best of my ability; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 17th day of November, 2020.

A handwritten signature in cursive script, appearing to read "Janine Thomas", written in dark ink.

Janine Thomas
Notary Public

[& - abetting]

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